83-1927

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALTER LEE EVANS, et al., *Petitioners*

v.

THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

THEODORE S. WOROZBYT
(Counsel of Record)
WILLIAM A. MORRISON
Attorneys for Petitioner
1414 Cain Tower
229 Peachtree St., N.E.
Atlanta, Georgia 30303-1665
(404) 658-1670

QUESTION

Where the State of Georgia has 45 judicial circuits, each of which has its own district attorney, who is elected only by the voters who reside in the respective circuit; and where each circuit has its own superior court judges (123 in sum total for all circuits) who are elected only by the voters who reside in the respective circuits; may the Georgia Supreme Court vest in each and every of the 45 district attorneys' the jurisdiction and authority to seek Title III (§2510 *et seq.*, Title 18 USC) electronic surveillance directed at any phone and/or citizen in the entire State of Georgia and vest in each and every of the 123 superior court judges, the jurisdiction, authority and power to implement Title III electronic surveillance against each and every phone and/or citizen in the entire State of Georgia; notwithstanding: the jurisdictional centralization provisions of Title III (§2510, *et seq.*, Title 18 USC) as interpreted by this Court in *U. S. v. Giordano* (416 U.S. 505, 1974); the explicitly expressed intent of Congress to restrict and limit jurisdiction and require political accountability (as cited by this Court in *Giordano*); and the express verbiage of Title III to the contrary?

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No.

IN THE

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OCTOBER TERM, 1983

WALTER LEE EVANS, et al.

v.

STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Theodore S. Worozbyt and William A. Morrison, on behalf of Walter Lee Evans, William Victor Evans, Kenneth H. Adams, and R. K. Sellers (Petitioners will hereinafter be referred to collectively as Evans), petition for a writ of certiorari to review the judgment of the Georgia Supreme Court in this case.

OPINION BELOW

The opinion of the Georgia Supreme Court (App. A, infra, 1a-22a), is reported at 252 Ga. 312.

JURISDICTION

The judgment of the Georgia Supreme Court (App. A, infra, 1a-22a), was entered on March 15, 1984. An order denying Evans timely motion for rehearing (App. 23a), was entered on March 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

This is a state wire-tap case, electronic surveillance, pursuant to Title 18, U.S.C. §§2510, *et seq.* (App. 25a) (hereinafter Title III) and §16-11-60 *et seq.*, Official Code of Georgia (OCGA) (App. 82a) being directed at lottery operations centered in Atlanta, Georgia.

The facts relevant to this petition were undisputed at the trial and the state appellate level.

The surveillance spanned approximately six months (June 1981 through December 1981) and embraced forty-one phones. About 700 hours of tapes were procured.

It should be noted here that this petition addresses only the *jurisdiction* and *authority*, (in contemplation of Federal Law) of the District Attorney and Superior Court of the Atlanta Judicial Circuit* to implement wire-taps against phones and people outside of their territorial jurisdictions.

Thus, there is no issue here as to such considerations as probable cause, procedural paperwork, minimization, post-tap violations, etc.

The first tap warrant was applied for by the Atlanta Circuit District Attorney and issued by an Atlanta Circuit Superior Court Judge. (Exhibit Vol. I, pp. 1-39).

The first tap warrant spawned the second, which spawned the third, et cetera . . . until twelve separate warrants were issued, all upon application of the Atlanta Circuit District Attorney and issued by an Atlanta Circuit Superior Judge. (Exhibits Vols. I through V).

The "territorial jurisdiction" of the Georgia Superior

*Geographically, the Atlanta Judicial Circuit is Fulton County, Georgia.

Courts is the "judicial circuit." (*Granese v. State*, 232 Ga. 193, 197, 1974). The State of Georgia is divided into forty-five judicial circuits, each circuit having within it one or more of Georgia's 159 counties.

Each circuit has its own district attorney, elected by the voters who reside in that circuit. Each judicial circuit has from one to eleven Superior Court Judges, the number being dependent, in part, on the population of the given circuit.

The wire-taps originated with an investigative (wire-tap) warrant being issued first in the Atlanta Judicial Circuit (which has eleven Superior Court Judges). However, the third warrant (Exhibit Vol. I, pp. 259-310) was directed at a phone and address located in the Stone Mountain Judicial Circuit, a circuit contiguous to the Atlanta Circuit.

The third tap warrant spawned the fourth, which was directed at a location in the Clayton Judicial Circuit. Although the wire-taps eventually went into eight separate judicial circuits, all monitoring and tape-recording took place in the Atlanta Judicial Circuit.

This was accomplished by the authorities running "lease lines" from the target phone circuitry back to the Atlanta Judicial Circuit. This was done, of course, with the cooperation of the phone company and pursuant to the respective wire-tap warrant.

The initial focal point of the "tap" was the "terminal box" associated with any given phone. The authorities would lease a line from the given terminal box back to a listening post located in the Atlanta Circuit. The terminal box associated with the given phone would always be geographically in the immediate vicinity of the target telephone.

The terminals (in the terminal box) of the target telephone would be spliced to the terminals of the "lease line" (also in same "terminal box"), utilizing an "induction coil", a device which allowed transmittal of the electrical impulses of the conversation from the target phone terminals to the "lease line" terminals absent any detectable voltage/amperage drop by use of electromagnetic field principles. (Schematical diagram of terminal box configuration, Exhibit Vol. VI, p. 2368).

The conversation/communication impulses would then be received at the listening post, there to be monitored and recorded pursuant to normal Title III techniques and requirements. In this manner, from one listening post in the Atlanta Circuit, communications over forty-one phones located in eight separate judicial circuits were monitored.

The seven judicial circuits (other than the Atlanta) into which lease lines were run contain eighteen counties in which reside 1,460,206 people. (1980 census).

It is undisputed that the district attorneys of the various seven circuits into which the subject wire-taps went were not made aware of their existence until after their termination. (Vol. I, pp. 93-97).

The wire-tap investigation led to the indictment of Evans, et al., under Georgia's RICO Act, the predicate acts premised on lottery transactions. Initially Evans, et al., were indicted along with Waller, et al., but the cases were severed and this case re-indicted for reasons irrelevant to this petition. The *Waller** case is presently in this Court on other questions.

*(*Waller, et al. v. Georgia*, No. 83-231, cert. granted Nov. 7, 1983, argued March 27, 1984). The *Waller* case is a companion case to this case only in the sense that both flowed from the same series of wire-taps.

The case was re-indicted (#A-62407, Fulton Superior Court, Atlanta Judicial Circuit) on August 20, 1982.

On September 29, 1982, Evans timely filed his Second Amendment to Motion to Suppress (R. 29) and ancillary thereto filed his First Memorandum of Law in Support of Motion to Suppress.

In those pleadings, at the pre-trial level, Evans timely and properly raised the federal questions presented here. Specifically, Evans asserted that neither the District Attorney nor the Superior Court Judges of the Atlanta Judicial Circuit had jurisdiction to implement electronic surveillance outside the territorial jurisdiction of the Atlanta Circuit in contemplation of the specific sections of Title III applicable and other federal authorities cited herein.

Specifically, Evans timely and properly raised and argued the *precise* issues and arguments made herein at the pre-trial level. (App. 52a-69a).

The trial court denied Evans' Motion to Suppress as amended twice on October 6, 1982, orally, from the bench. (Transcript of Proceeding, Motion to Suppress, Vol. I, p. 371). Evans, et al., were convicted of violation of Georgia's RICO Act on October 14, 1982, pursuant to jury trial.

There was no dispute at either the trial or state appellate level that *all* the evidence against Evans derived from the wire-taps which went outside of the Atlanta Judicial Circuit.

Appeal was taken to the Georgia Supreme Court on April 28, 1983. (R. 1). In his appeal brief, Evans again raised the precise federal questions raised herein. (Appendix 70a-81a). On March 15, 1984, the Georgia Supreme

Court, in a 4 to 3 decision (dissenting opinion by Justice Bell, see Appendix 19a-22a) affirmed Evans' conviction.

Motion for re-hearing was denied on March 28, 1984. (Appendix 23a). On April 6, 1984, Evans filed notice of his intention to apply for certiorari in this Court.

REASONS FOR ALLOWANCE OF THE WRIT

Evans shall not attempt to supersede the eloquence of argument relative to this question contained in Justice Bell's dissenting opinion. (Appendix 19a-22a)

> "Because today's majority opinion produces a result squarely contradictory to the fundamental intent of our electronic surveillance statute, I dissent . . . This conclusion is also compelled by a consideration which is crucial to the resolution of this case, but is ignored by the majority—an examination of the Congressional policy underlying the federal, and I believe our own, surveillance statute. Congress clearly intended that applications for wire-taps be sought, to the greatest extent practicable, under a uniform, consistent policy. 'Paragraph (2) [18 USCA §2516(2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction . . . for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most states, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. *The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State* . . . Where no such office exists, policymaking would not be possible on a statewide basis; it would have to

move down to the next level of government . . . In most States, the principal prosecuting attorney at next political level of a State, usually the county, would be the district attorney . . . *The intent . . . is to centralize areawide law enforcement in him* . . . Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the State and the district attorney anywhere in his county.' S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968) (emphasis supplied), cited in *Giordano*, 416 US 505, 522, fn. 11 (94 SCt 1820, 40 LE2d 341) (1974). It was unquestionably the intent of Congress and our General Assembly to centralize in our state Attorney General cross-jurisdictional law enforcement in the area of the use of electronic surveillance, and to centralize electronic surveillance within any given circuit in the hands of that circuit's district attorney. Although it is not the duty of this Court to find ways to circumvent clear legislative intent, the majority has effectively done so in the instant case, as its opinion will produce results squarely contradictory to the intent of Congress and our General Assembly. Under the majority's rationale, the district attorney of any judicial circuit in Georgia can now apply to a judge in his circuit for a warrant authorizing the interception of wire or oral communications in any or all of the 159 counties of the State of Georgia. Moreover, the citizens of any given judicial circuit will now be subject to electronic surveillance warrants taken out by the Attorney General, their own district attorney, and any district attorney of the other forty-four judicial circuits of this state. I think that the potential impact on personal privacy of a total of forty-six uncoordinated, and, possibly, significantly conflicting state prosecutorial policies is clearly contrary to the fundamental intent of Congress and of our General Assembly, and should be disallowed. In conclusion, I find that under the facts of this case

the Fulton district attorney did not have authority to apply for warrants for surveillance of telephones physically placed outside his own circuit; that the Fulton superior court judge had no authority to issue them; and that the evidence obtained pursuant to the defective warrants should have been suppressed.

For the above reasons, I would reverse the appellants' convictions."

The Georgia decision cannot be reconciled with either *U. S. v. Giordano*, 416 U.S. 505 (1974), or the expressed intent of Congress as manifested in Justice Bells' dissent.

The Georgia decision vests in each and every of the 45 district attorneys in Georgia more wire-tap jurisdiction and authority than possessed by any one of the three United States Attorneys in the three federal districts of Georgia. Furthermore, the Georgia decision vests in each and every of the 123 State Superior Court Judges far greater wire-tap jurisdiction and authority than any U. S. District Judge in Georgia.

If a given district attorney can circumvent his wire-tap territorial jurisdiction by running "lease lines" in Georgia, may not any district attorney (or his equivalent) of *any* political subdivision of *any* state do the same? This ought not be the law, or the intent of Congress, in enacting Title III, would be torn asunder:

". . . [T]he authority to apply for court orders is to be narrowly confined . . ." *U. S. v. Giordano*, 416 U. S. 505, 520 (1974).

"But it is apparent that Congress desired to *centralize* and *limit* this authority where it was feasible to do so . . ." (emphasis added) *U. S. v. Giordano*, 416 U. S. 505, 522 (1974).

> "Paragraph (1) (of §2516, Title 18, USC), . . . centralizes in a publicly responsible official subject to the political process, the formulation of law enforcement policy on the use of electronic surveillance techniques. S. Rep. No. 1097, 90th Cong., 2d Sess., 96-97 (1968)" *U. S. v. Giordano*, 416 U. S. 505, 520 (1974).

In this cause, the Atlanta Judicial Circuit District Attorney is politically accountable *only* to the voters who reside in the Atlanta Circuit. Thus, the voters who reside in the seven judicial circuits in which wire-taps were implemented (some 1,460,206) have been disenfranchised, i.e., they have no direct means to deter or remedy abuses of their privacy interests.

Nevertheless, if this scenario is to be acceptable in Georgia, it should be the law in *all* the states, and this Court should grant certiorari to establish a bellwether decision.

The Georgia decision is also in conflict with the decision in *Lee v. Florida*, 392 U.S. 378, 20 L.Ed.2d 1166, 88 S.Ct. 2096 (1968), in which federal authority to prohibit the use in state courts of evidence seized by electronic surveillance in violation of Title III orginates. Although *Lee v. Florida*, 392 U.S. 378 was decided two days before Title III was enacted, its doctrine has been assumed to survive; such assumption premised on Congress' expressed intent that said doctrine would be embraced in Title III, see *U. S. v. Marion*, 535 F.2d 697, 702 (2d Cir., 1976); S. Rep. 1097, 90th Cong., 2d Sess., quoted in 2 U.S. Code Cong. & Adm. News at 2187 (1968), see also H. Rep. 488, 90th Cong., 1st Sess. (1967).

This Court should explicitly affirm (or reject) that the doctrine of *Lee v. Florida*, 392 U.S. 378 (1968) survives the enactment of Title III.

Title 18, §2518(3), U.S.C. provides that the judge issuing the wire-tap order:

> ". . . may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting . . ."

The Georgia decision, acknowledging that the wire-tap must pass muster, in the first instance, with Title III, holds that to "intercept" means, in effect, to "hear". (See Appendix 6a-8a).

Thus, as argued below, to *tape-record* communications, per se, indiscriminately, whether by telephone wire-tap or by "miniature transmitters and microphones", may *never* be a violation of Title III. To trigger Title III, according to this analysis, one would have to "hear", in the physical sense, the communication, presumably by playing the tape-recording. This analysis leads to bizarre extrapolations. It would be possible to completely circumvent Title III by either taking the tape-recording outside U. S. jurisdiction to "hear" it, or the electronic data obtained from the tap could be radio transmitted directly to a point outside U. S. jurisdiction and "heard" there.

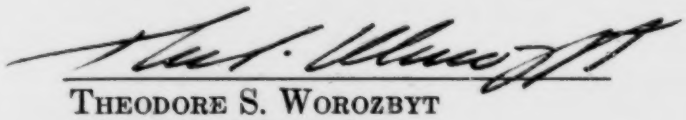
The Georgia decision misconstrued the legal import of the term "aural acquisition" to mean physically "hear". Such interpretation emasculated the judicial jurisdictional limitations of §2518 (3), Title 18, U.S.C.

If this is to be the law in Georgia state courts, it should be the law in all the courts, state and federal. But surely this should not be, for then judicial jurisdictional lines would not be stretched, they would be obliterated.

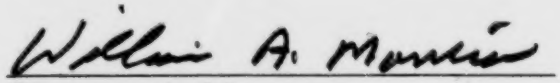
CONCLUSION

For each of the reasons stated above the writ should be granted.

Respectfully submitted,



THEODORE S. WOROZBYT
(Counsel of Record)



WILLIAM A. MORRISON
Attorneys for Petitioner

1414 Cain Tower
229 Peachtree St., N.E.
Atlanta, Georgia 30303-1665
(404) 658-1670

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

[Decided: March 15, 1984]

EVANS, et al.,
Appellants,
VS.
THE STATE OF GEORGIA,
Appellee.

CASE #40008

PER CURIAM.

Appellants were convicted in Fulton Superior Court of violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. L. 1980, pp. 405, 407, Code 1933, § 26-3402 (a) (17) [now OCGA § 16-14-3 (3) (A) (xviii)], based on predicate offenses of commercial gambling, OCGA § 16-12-22. On appeal they raise three enumerations of error.

1. In their first enumeration appellants contend that the court erred by refusing to grant their motions to suppress the fruits of electronic surveillance conducted by appellee.

The evidence at trial showed that Walter Lee Evans participated with numerous others in a lottery ring operating in the metropolitan Atlanta area which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange.[1] The evidence was obtained pursuant to twelve surveillance (wiretap) warrants issued by a Fulton Superior Court judge upon application by the Fulton County district attorney. The defendants do not contest the fact that there was probable cause for the issuance of the warrants, nor do they contest the fact that the venue of the offenses was Fulton

County. The defendants urge that the warrants were invalid because the Fulton district attorney and superior court judge were without authority to apply for and issue surveillance warrants as to telephones located outside Fulton County (i.e., outside the Atlanta Judicial Circuit).

The first warrant was issued for two telephones located at an address in Fulton County. The second warrant was issued shortly thereafter for three phones also located in Fulton County. Based upon information obtained from the preceding wiretaps, subsequent warrants were issued as to phones in DeKalb County (Stone Mountain Judicial Circuit), then Clayton County (Clayton Judicial Circuit), then Cobb County (Cobb Judicial Circuit), then Cherokee (Blue Ridge Judicial Circuit), then Rockdale County (then the Stone Mountain Judicial Circuit), then Paulding County (Tallapoosa Judicial Circuit), then Gwinnett County (Gwinnett Judicial Circuit), and finally Henry County (Flint Judicial Circuit), not to mention other phones located in Fulton County (Atlanta Judicial Circuit). In all, 41 telephones were tapped, of which 23 were located in 7 judicial circuits other than the Atlanta Judicial Circuit, pursuant to warrants sought and obtained in Fulton County.

In order to discuss the issues involved in this case, it is necessary to describe in some detail the equipment used for the surveillance. The Fulton district attorney's surveillance team worked out of a rented motel room near the intersection of Sylvan Road and Interstate 85, in Hapeville, Fulton County (the "listening post"). The initial step in the installation of each of the wiretaps was to present the court order authorizing the wiretap to the telephone company, which then selected an "appearance point" and informed the investigators of its location. An

"appearance point" was a site, located at some point between the telephone to be tapped and the telephone company central switching office servicing it, where the line to be tapped, also known as the "subscriber line", converged with another telephone line running to the central switching office, with the latter line being leased to the district attorney (the "leased line"). All of the appearance points assigned for the surveillances involved in this case were located in neighborhood junction boxes, also known as terminal boxes, which (for purposes of this appeal) were located in the same county as the telephone to be tapped.

The evidence showed that the simplest method of installing a tap would have been to proceed to the junction box and to use jumper wires to connect the terminals, otherwise known as binding posts, of the subscriber line to the terminals of the line leased to the district attorney. Such an apparatus would have conducted the electronic signal of the tapped phone conversation over the leased line to the central switching office, and thence to the listening post in Fulton County. However, this arrangement would have presented a serious risk of detection by criminal suspects, because it would have caused a drop in voltage measurable by equipment available to commercial gamblers. To forestall detection, an inductor coil/jumper wire, placed in the neighborhood terminal box, and a control unit, located at the listening post, were used.

Sgt. John Woodard, a nine-year veteran of the Atlanta Police Department who has taken several courses in physics and electricity, testified that he installed the surveillance equipment used in this case. He testified that the inductor coil/jumper wire is a piece of equipment

consisting essentially of two magnetic coils and four lead wires. He said that his installation procedure was to go to the junction box servicing each subscriber phone, open it, and locate the terminals for the subscriber phone and the leased line. He would then connect two lead wires of the inductor coil to the subscriber phone's terminals, and the remaining lead wires to the leased phone's terminals.

Woodard testified that the surveillance team's listening post in Hapeville contained three pieces of equipment: the control unit, a computerized pen register, and a tape recorder. He said that, after the inductor coil was installed, surveillance was initiated by dialing a telephone number assigned to the district attorney by the telephone company. Calling this number activated the inductor coil by sending electrical current through it. According to Woodard, whenever the tapped phone was taken off the hook, the signal from that telephone passed through the inductor coils to the leased line. This signal then was conducted over the leased line to the telephone switching office, and from there to the listening post in Hapeville. (According to Woodard, wiretaps using inductor coils and control units do not drain a measurable amount of voltage from subscriber lines.)

There was additional testimony by Woodard that when the signal reached the listening post, it passed through the control unit to the computerized pen register, and then to the tape recorder. The function of the pen register was to record on paper tape the date and time that the tapped phone was taken off the hook; whether the call was incoming or outgoing; if outgoing, the number dialed; and the time the call ended. The tape recorder aurally recorded the conversation on magnetic tape.

The primary issue raised by the first enumeration of

error is whether the Fulton district attorney was authorized by federal and state law to apply for surveillance warrants for the telephones which were located outside of Fulton County and whether the Fulton Superior Court judge was statutorily authorized to issue them. If not, the evidence obtained by such extraterritorial warrants should be suppressed. 18 USCA § 2515; OCGA § 16-11-67.

To start, we must emphasize that the issues in this case are not merely ones of interpretation of state statutes. Instead, as pointed out by the Court of Appeals in *Cox v. State*, 152 Ga. App. 453 (1) (263 SE2d 238) (1979), "In 1968 the Congress enacted the Omnibus Crime Control and Safe Streets Act, a portion of which dealt with the interception and disclosure of wire or oral communications. 18 USC § 2510 et seq. [18 USCA Ch. 119]. The act set down procedures whereby federal authorities could secure an authorization for wiretaps. It further provided for concurrent state regulation of wiretaps subject, at the minimum, to the requirements of the federal legislation. . . ." *Cox*, supra, 152 Ga. App. at 454. "Georgia has enacted such a statute and the wiretaps at issue in the instant case were made pursuant to this Georgia statute. [OCGA § 16-11-64.] Which law, state or federal, controls? '[D]espite the fact that the interceptions were made pursuant to a state court authorization, at the very least the other requirements of Title III [of the Omnibus Crime Act] . . . must be satisfied. But whether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III. If a state should set forth procedures *more* exacting than those of the federal statute, however, the validity of the interceptions and the orders of authorization by which they were made would have to comply

with that test as well. [Cits.]' United States v. Marion, 535 F2d 697, 702 (2d Cir. 1976 [cits]. Thus, '[w]iretapping and surveillance are the subjects of federal and state law and *both must be complied with where applicable.' Orkin v. State,* 236 Ga. 176, 179 (223 S2d 61) (1976). (Emphasis supplied.)" *Cox,* supra, 152 Ga. App. at 455. "In other words, for evidence obtained through state-authorized wiretaps to be admissible in a state criminal proceeding, it must have been obtained in a manner not inconsistent with the requirements of *both* the federal and state laws." Id. at 455-456.

The Omnibus Crime Control Act, 18 USCA § 2516 (2), provides: "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling. . . ."

Section 2518, supra (18 USCA § 2518), paragraph (3), provides: "Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in

which the judge is sitting. . . ." The critical language regarding jurisdiction is "interception . . . within the territorial jurisdiction of the court", because the word "intercept" is defined to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 USCA § 2510 (4). Substituting the definition of "intercept" for the word "interception" in 18 USCA § 2518 (3), quoted above, that section provides that, upon application, the judge may enter an order authorizing the aural acquisition of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting. It is undisputed that the only aural acquisition of the defendant's communications occurred in the Atlanta Judicial Circuit (Fulton County) where the judge authorizing the investigative warrants was sitting. We therefore find that federal law authorized issuance of these warrants by the Fulton Superior Court judge.

Defendants point out that 18 USCA § 2518 (1) (b) (ii) provides that the application must include "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted. . . ." Defendants argue that, according to our interpretation, the foregoing would require a description of the nature and location of the listening post rather than a description of the nature and location of the facility housing the telephone to be tapped. However, the Omnibus Crime Control Act applies to "oral communication" in addition to "wire communication" (telephone), 18 USCA § 2510 (1) (2), and prohibits the use of miniature transmitters and microphones in transmitting "oral communications", Senate Report No. 1097, 90th Cong., 2d Sess., 535-536 (1968). We therefore agree with defendants that the phrase "facilities from which . . .

the communication is to be intercepted" refers to the facility housing the telephone to be tapped, see 18 USCA § 2518 (3) (d), but we find that the phrase "place where the communication is to be intercepted" refers to the place of interception of oral communications by such means as miniature transmitters and microphones, not to the listening post where the communications are heard. The same analysis (separating "wire" from "oral communications" and applying the word "facilities" to the former and the word "place" to the latter) is applicable to 18 USCA § 2518 (3) (d) and 18 USCA § 2518 (4) (b).

Recognizing that the provisions relied upon by defendants, 18 USCA §§ 2518 (1) (b) (ii), (3)(d) and (4)(b), supra, do not relate directly to the question of jurisdiction here in issue, but do relate to the location of the offense, 18 USCA § 2518 (3)(d), and apply to both wire and oral communications, we adhere to our conclusion that the jurisdictional provision of the federal law, 18 USCA § 2518 (3), confers jurisdiction on a superior court judge to authorize interception (aural acquisition) of wire communications within his territorial jurisdiction.

We turn now to state law, which involves not the place of interception (aural acquisition), but the place where a "device" is physically placed. OCGA § 16-11-64 (b) provides: "When in the course of his official duties, a law enforcement officer desiring to make use of any device, but only as such term is specifically defined by Code Section 16-11-60 . . . the law enforcement officer shall act only in compliance with the procedure provided for in this subsection: (1) When there is probable cause to believe that a . . . person is committing or has committed . . . any crimes involving . . . gambling . . . or there is probable cause to believe that a private place is being

utilized or has been utilized for the commission of any such crime, then, upon written application, under oath, of the *district attorney of the circuit wherein the device is to be physically placed* . . . any judge of the superior court *of the circuit aforesaid* may issue an investigation warrant permitting the use of devices, as defined by Code Section 16-11-60, for the surveillance of such person or place. . . ." (Emphasis supplied.)

The word "device" is defined in OCGA § 16-11-60 (1) as "an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds . . . and which involves in its operation electricity [or] electronics. . . ." The dispute between the parties now centers on the question of which of the pieces of equipment used by the district attorney—the inductor coil on the one hand, or the control unit, computerized pen register and particularly the tape recorder, on the other hand, —were "devices" within the purview of § 16-11-60 (1) for the purpose of establishing jurisdiction under § 16-11-64 (1) (b).

Defendants urge that because the inductor coil, a piece of equipment essential to the success of the wiretap, both "intercepted" sounds and "transmitted" them to the listening post in Hapeville, the coil was a wiretap "device" under § 16-11-60 (1). It is their further contention that, because the state installed the coils in junction boxes located in counties outside the Atlanta Judicial Circuit, the devices were "physically placed" in those other circuits, and that therefore the Fulton district attorney lacked statutory authority to apply for the warrants and the Fulton Superior Court judge lacked jurisdiction to issue them.

However, if the district attorney of the Stone Moun-

tain Judicial Circuit had applied for and obtained the third warrant from a superior court judge in that circuit, the defendants could argue, and would be justified in arguing, that although the inductor coil was placed in DeKalb County, the "devices" for "intercepting", "recording" and "overhearing" their communications were physically placed in Hapeville, outside the Stone Mountain Judicial Circuit, and thus their communications should be suppressed. To avoid this undeniably correct argument, a separate "recording" device either would have to be placed and monitored in the Stone Mountain Judicial Circuit, not to mention the six other circuits involved, or duplicate warrants would have to be applied for and issued in each circuit in each instance. We find no indication that the General Assembly intended to require that separate recording devices be utilized or that duplicate warrants be issued and conclude that such was not intended. We therefore must apply the law as written, to a factual situation possibly not envisioned by the General Assembly.

The purpose of the General Assembly in enacting the law in question, insofar as telephone and other private communications are concerned, was to prevent such private conversations from being overheard by unauthorized persons. We therefore interpret the word "intercepting" in OCGA § 16-11-60 (1), like its federal counterpart, as "aural acquisition". Similarly, we find that the word "transmitting" in OCGA § 16-11-60 (1) was included to cover such instruments and apparatus as miniature transmitters and microphones used to overhear private conversations other than those conducted by telephone. Compare paragraph (1) of OCGA § 16-11-62 with paragraph (4) thereof. We therefore conclude that the inductor coil involved here was not a device used to overhear, record

or intercept defendant's conversations within the meaning of OCGA §§ 16-11-60 (1), 16-11-64 (b) (1). The coil was a device to prevent detection of those devices being used to overhear and record defendants' conversations, which devices were physically located in Fulton County. We are supported in this conclusion by the fact that had these officers proceeded as they did but without a warrant, their offense [interception of a telephone communication; OCGA § 16-11-62 (4)] would have been committed in Fulton County and they could have been prosecuted there.

Thus, the district attorney and superior court judge of the Atlanta Judicial Circuit were authorized to apply for and issue the warrants here in issue where the listening post as well as the gambling were located in Fulton County. The trial court did not err in denying defendants' motions to suppress.

2. In their second enumeration of error appellants claim that the trial court erred by overruling their general demurrer to the indictment. In the demurrer filed with the trial court, appellants contended that the Georgia RICO act violated both the ex post facto and retroactivity proscriptions of Const. 1976, Art. I, Sec. I, Para. VII (now, with minor editorial changes, Const. 1983 Art. I, Sec. I, Para. X). Const. 1976, Art. I, Sec. I, Para. VII provided that, "[n]o bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grant of special privileges or immunities, shall be passed." During a motions hearing in the trial court, appellants abandoned their reliance on the prohibition against ex post facto laws, and argued only that the RICO act is unconstitutionally retroactive. On appeal they emphasize that they are not contending

that RICO is an ex post facto law, but that RICO is unconstitutionally retroactive because, by defining "pattern of racketeering activity" as "engaging in at least two incidents of racketeering activity . . . provided at least one of such incidents occurred after July 1, 1980 . . . ," it assigns essentially different effects to commercial gambling transactions which occurred prior to that date. See OCGA § 16-14-3 (2).

There are two reasons this argument has no merit. First, the history of our state Constitution shows that the term "retroactive law" applies exclusively to constitutional challenges to civil statutes, and that a challenge to RICO's constitutionality on the ground of retrospectivity must be raised, if at all, on the basis that it is an "ex post facto law." See *Williams v. State*, 213 Ga. 221 (98 SE2d 373) (1957); *Bailey v. State*, 210 Ga. 52, 54 (77 SE2d 511) (1953); *Bussey v. Bishop*, 169 Ga. 251, 256 (150 SE 78) (1929); *Boston & Gunby v. Cummins*, 16 Ga. 102, 106-107 (1854). Appellants having specifically abandoned their ex post facto challenge, there is nothing for us to review.

Second, even were this court to treat this enumeration as raising an ex post facto issue, we would find no error. "[I]t long has been the law that before a statute can be attacked by anyone on the ground of its unconstitutionality, he must show that its enforcement infringes upon some right of his and that the infringement results from the unconstitutional feature of the statute upon which he bases his attack. [cits.] He must show that he is within the class of persons with respect to whom the Act is unconstitutional. [cits]." *State v. Raybon*, 242 Ga. 858 (252 SE2d 417) (1979). " ' "In order to raise a question as to the constitutionality of a 'law,' at least three things

must be shown: (1) The statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violates such constitutional provision." ' [cits.]" *Wallin v. State*, 248 Ga. 29, 30 (279 SE2d 687) (1981). Appellants have failed to show that any of the predicate transactions of commercial gambling which formed the basis of their convictions occurred prior to July 1, 1980, and they therefore have failed to carry their burden to demonstrate how the RICO statute, as applied to them, violated Const. 1976, Art. I, Sec. I. Para. VII. Accordingly, their attack on the statute is insufficient.

3. Appellants' final enumeration of error concerns their argument that the trial court erred by denying two of their requested jury charges. The record shows that the court instructed the jury on the indicted RICO offense, as well as the predicate offenses of commercial gambling, OCGA § 16-12-22. Appellants claim the trial court erred by failing to charge on the offenses of keeping a gambling place, OCGA § 16-12-23, and communicating gambling information, OCGA § 16-12-28. Appellants do not contend that communicating gambling information and keeping a gambling place are as a matter of law or as a matter of fact lesser included offenses of commercial gambling, see *Romano v. State*, 162 Ga. App. 816 (2) (292 SE2d 533) (1982); *Baxter v. State*, 134 Ga. App. 286, 294 (4) (214 SE2d 578) (1975), or of the RICO statute, but instead argue that they were entitled to the omitted instructions because the indictment used language sufficient to embrace those offenses. In support, they cite the "same transaction" rule first announced in *Goldin v. State*, 104

Ga. 549 (1,2) (30 SE 749) (1898). Accord, *State v. Williams*, 247 Ga. 200 (2) (276 SE2d 46) (1981); *Rowe v. State*, 166 Ga. App. 836 (305 SE2d 624) (1983); *Nelson v. State*, 136 Ga. App. 861 (222 SE2d 677) (1981). We disagree.

Pretermitting the issue of whether the RICO indictment in the instant case used language sufficient to embrace §§ 16-12-23 and 16-12-28, we do not think that the *Goldin* rule is apposite. In *Goldin* this court held that "[i]t is an elementary principle of criminal procedure that no person can be convicted of any offense not charged in the indictment. There may, of course, be a conviction of a lesser offense than that expressly named in the indictment, where the former is necessarily included in the latter, and also in some cases in which the lesser is not so included in the greater offense but where the language used in the indictment is sufficient to embrace the smaller offense." Id., 104 Ga. at 550. *Goldin* and its progeny dealt with issues of whether a given count of an indictment alleged more than one separate and distinct offense, and hence was fatally duplicitous, *Williams*, supra, 247 Ga. at 203-204, and whether a defendant's conviction of a given offense was unauthorized because that offense was not included in the indictment, *Rowe*, supra, 166 Ga. App. 836. These issues are not raised by appellants; instead, the question they frame is, assuming an indictment's language is sufficient to embrace an offense for which the defendant is not being tried, and which is not a lesser included offense of the offense for which he is on trial, whether the defendant has a right to have the jury instructed as to the offense to which he is not made to defend. The answer is in the negative.

In *Myers v. State*, 97 Ga. 76 (25 SE 252) (1895), this

court held that "[t]hough submitted in writing, requests for instructions to the jury based upon theories of the law which, upon no candid view of the pleadings and evidence, are involved in the issues being tried, should be disregarded by the court. . . ." More recently, in the course of establishing uniform rules for determining under what circumstances a trial court should charge the jury on lesser included offenses, *State v. Stonaker*, 236 Ga. 1 (222 SE2d 354) (1976), this court set forth the rule that "(1) The trial judge must charge the jury on each crime specified in the indictment or accusation, unless the evidence does not warrant a conviction of such crime, or unless the state has affirmatively withdrawn a crime or stricken it from the indictment or accusation," Id. at 2. Although the indictment in this case may have included language which arguably charged appellants with violating §§ 16-12-23 and 16-12-28, and the evidence presented during trial may have warranted convictions thereon, appellants were neither tried nor convicted of those offenses, and, to the extent that the indictment could be interpreted as implicitly charging appellants with them, we hold that appellee impliedly withdrew them from consideration. See also *Hightower v. State*, ____ Ga. ____ (____ SE2d ____) (1984). We find no error.

Judgment affirmed. All the Justices concur, except Clarke, Smith and Bell, JJ., who dissent.

END NOTES

[1] This case involves the same gambling ring as our recent opinion in *Waller v. State*, 251 Ga. 124 (303 SE2d 437) (1983). The only issue common to both cases is the challenge to evidence gathered by electronic surveillance devices in counties other than Fulton County pursuant to warrants obtained in Fulton County. Id., (5). However, due to a procedural default by the defendants, this issue was not resolved in *Waller*.

The same issue was raised in *Romano v. State*, 162 Ga. App. 816 (1) (1982) (cert. denied), but, as in *Waller*, the merits were not reached.

40008. EVANS v. THE STATE

GREGORY, Justice, concurring.

I agree with all that is said in the majority and add these thoughts with regard to Division One of the opinion.

OCGA § 16-11-60(1) defines "device" as "an instrument or apparatus used for overhearing, recording, intercepting or *transmitting sounds* . . . and which involves in its operation electricity [or] electronics. . . ." [Emphasis supplied.] *The American Heritage Dictionary of the English Language,* (1980), defines "sound" as "a vibratory disturbance in the pressure and density of a fluid, or in the elastic strain in a solid, with frequency in the approximate range between 20 and 20,000 cycles per second, and *capable of being detected by the organs of hearing.*" [Emphasis supplied.]

Electrical impulses in telephone wires are not sounds. The induction coils placed outside the Atlanta Judicial Circuit intercepted electrical impulses, but not sounds. At the earliest, sounds were intercepted when these electrical impulses were recorded in Fulton County.

The right of privacy is the thing to be protected by OCGA Title 16, Ch. 11, Art. 3. That right is not violated by the interception of an electrical impulse any more than the *interception* of a letter in the mail violates that right. Of course, the potential for violation exists in both cases. But it is only the opening and reading of the letter on one hand, and, at least, the recording and, perhaps, hearing on the other, which violates one's right of privacy. Our legislature chose to use the word "sound" rather than a broader term which might include an electrical impulse.

I note that both the state and federal statutes contain safeguards. There is an obligation to destroy all matter

obtained by surveillance if evidence of one of the specific crimes set forth in the wiretap law has not been obtained within 30 days, and to certify this fact under oath in writing to the judge who issued the warrant. OCGA § 16-11-64(b)(6). If information of such a crime *is* obtained, the prosecuting attorney must notify the accused of the existence and substance of the evidence or information, and must make it available for inspection and copying if it has been reduced to permanent form. OCGA § 16-11-64 (b)(7). An exclusionary rule exists by statute. OCGA § 16-11-64(b)(8). Violations of the wiretap law are misdemeanors, OCGA § 16-11-83, and can support actions for invasion of privacy, OCGA § 16-11-64(b)(8). Violations of the federal law can lead to awards of actual damages, punitive damages and attorney fees. 18 USCA § 2520. These sanctions should assure sufficient restraint upon law enforcement officials and provide adequate protection to the right of privacy.

I am authorized to state that Justice Weltner joins in this concurrence.

40008. WALTER LEE EVANS, et al v. THE STATE

BELL, Justice, dissenting.

Because today's majority opinion produces a result squarely contradictory to the fundamental intent of our electronic surveillance statute, I dissent.

This case turns upon whether the inductor coils utilized by the Fulton district attorney's surveillance team are "devices" within the meaning of OCGA § 16-11-60 (1). If they are, then the warrants issued in this case were defective, as they were not applied for or issued in the circuit where these "devices" were physically placed. OCGA § 16-11-64 (b); § 16-11-60 (1).

The majority, showing undue concern with the administrative inconvenience (majority opinion at 9), concludes that inductor coils are not devices within the meaning of OCGA § 16-11-60 (1).

I cannot agree. First, as a matter of fact, an inductor coil is clearly a device within the meaning of our surveillance statute. The state's own expert described how the inductor coils utilized by the state functioned. He said that whenever the target phone was being used, the electronic signal from the telephone passed through the magnetic coil which was attached by lead wires to the subscriber line's terminals, setting up an electromagnetic field within the inductor coil, which in turn reproduced the electronic signal within the magnetic coil which was attached by lead wire to the terminals on the line leased by the district attorney.[1] In view of this description of the function of an inductor coil, there can be no doubt that inductor coils clearly qualify as instruments or apparatuses which electronically intercept and transmit sounds within the facial meaning of OCGA § 16-11-60.

This conclusion is also compelled by a consideration which is crucial to the resolution of this case, but is ignored by the majority—an examination of the Congressional policy underlying the federal, and I believe our own, surveillance statute. Congress clearly intended that applications for wiretaps be sought, to the greatest extent practicable, under a uniform, consistent policy. "Paragraph (2) [18 USCA § 2516 (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction . . . for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. *The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State.* . . . Where no such office exists, policymaking would not be possible on a statewide basis; it would have to move down to the next level of government . . . In most States, the principal prosecuting attorney at next political level of a State, usually the county, would be the district attorney. . . . *The intent . . . is to centralize areawide law enforcement in him.* . . . Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the State and the district attorney anywhere in his county." S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968) (emphasis supplied), cited in Giordano, 416 US 505, 522, fn. 11 (94 SCt 1820, 40 LE2d 341) (1974).

It was unquestionably the intent of Congress and our General Assembly to centralize in our state Attorney General cross-jurisdictional law enforcement in the area of the use of electronic surveillance, and to centralize electronic surveillance within any given circuit in the hands of that circuit's district attorney. Although it is not the duty of this court to find ways to circumvent clear legislative intent, the majority has effectively done so in the instant case, as its opinion will produce results squarely contradictory to the intent of Congress and our General Assembly. Under the majority's rationale, the district attorney of any judicial circuit in Georgia can now apply to a judge in his circuit for a warrant authorizing the interception of wire or oral communications in any or all of the 159 counties of the State of Georgia. Moreover, the citizens of any given judicial circuit will now be subject to electronic surveillance warrants taken out by the Attorney General, their own district attorney, and any district attorney of the other forty-four judicial circuits of this state. I think that the potential impact on personal privacy of a total of forty-six uncoordinated, and, possibly, significantly conflicting state prosecutorial policies is clearly contrary to the fundamental intent of Congress and of our General Assembly, and should be disallowed. In conclusion, I find that under the facts of this case the Fulton district attorney did not have authority to apply for warrants for surveillance of telephones physically placed outside his own circuit; that the Fulton superior court judge had no authority to issue them; and that the evidence obtained pursuant to the defective warrants should have been suppressed.

For the above reasons, I would reverse the appellants' convictions.

END NOTES

[1] The majority apparently finds that the federal definition of "device" should control the definition of the term as used in OCGA Ch. 16, Art. 3, Pt. 1. But, this conclusion ignores the plain language of OCGA § 16-11-64, which speaks in terms of "a device, *but only as such term is specifically defined by Code Section 16-11-60*," (emphasis supplied), and of "investigation warrants permitting the use of devices, *as defined by Code Section 16-11-60*," (emphasis supplied). Because the General Assembly clearly intended that OCGA § 16-11-60 supply the sole definition of the term "device" governing state surveillance warrants, and because OCGA § 16-11-60's definition of that term is considerably more comprehensive than that of 18 USCA § 2510 (4) and (5), I do not consider the federal statute to be controlling on this point, and find that the broader definition of the state statute must be followed. *Cox*, supra, 152 Ga. App. 453, 454-456 (263 SE2d 238) (1979).

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

EVANS, ET AL.
VS
THE STATE OF GEORGIA } CASE #40008

ORDER

The Motion For Rehearing was denied today, March 28, 1984.

All Justices concur except Clarke, Smith, and Bell who dissent.

APPENDIX C

APPLICABLE FEDERAL CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT, UNITED STATES CONSTITUTION

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE XIV

Passed by Congress June 16, 1866. Ratified July 23, 1868.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

APPLICABLE FEDERAL STATUTE

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTIONS OF ORAL COMMUNICATIONS

Sec.
2510. Definitions.
2511. Interception and disclosure of wire or oral communications prohibited.
2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
2513. Confiscation of wire or oral communication intercepting devices.
[2514. Repealed.]
2515. Prohibition of use as evidence of intercepted wire or oral communications.
2516. Authorization for interception of wire or oral communications.
2517. Authorization for disclosure and use of intercepted wire or oral communcations.
2518. Procedure for interception of wire or oral communications.
2519. Reports concerning intercepted wire or oral communications.
2520. Recovery of civil damages authorized.

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the

point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or posession of the United States;

(4) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision

thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law endorcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.)

§2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, em-

ployees, or agents, landlord, custodian, or other specified person, has been provided with –

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of

foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub.L. 95-511, Title II, § 201(a)-(c), Oct. 25, 1978, 92 Stat. 1796, 1797.)

References in Text. The Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(e) and (f), is classified to section 1801 et seq. of Title 50, U.S.C.A., War and National Defense, and section 101 of such Act is classified to section 1801 of Title 50.

Sections 605 and 606 of the Communications Act of 1934, referred to in par. (2)(e) and (f), are classified to sections 605 and 606, respectively, of Title 47, U.S.C.A., Telegraphs, Telephones, and Radiotelegraphs.

§2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully –

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily use-

ful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person

under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 214.)

§2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels,

vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 215.)

[§2514. Repealed. Pub.L. 91-452, Title II, § 227(a), Oct. 15, 1970, 84 Stat. 930.]

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.)

§2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order au-

thorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954

(offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications

by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891; Pub.L. 95-598, Title III, § 314(h), Nov. 6, 1978, 92 Stat. 2677.)

References in Text. The Atomic Energy Act of 1954, referred to in par. (1)(a), is classified generally to section 2011 et seq. of Title 42, U.S.C.A., The Public Health and Welfare.

§2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who,

by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82

Stat. 217 and amended Pub.L. 91-452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.)

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for

interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular

communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral

communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order

showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided

for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and order shall be wherever the judge directs. Such applications and order shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection

may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been

furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United

States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218, and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654; Pub.L. 95-511, Title II, § 201(d)-(g), Oct. 25, 1978, 92 Stat. 1797, 1798.)

§2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law

enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222, and amended Pub.L. 95-511, Title II, § 201(h), Oct. 25, 1978, 92 Stat. 1798.)

§2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91-358, Title II, § 211(c), July 29, 1970, 84 Stat. 654.)

APPENDIX E

EXCERPTS FROM THE TRIAL COURT RECORD SHOWING THAT THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

[Filed in Office, Sept. 29, 1982; Deputy Clerk, Superior Court, Fulton County Georgia.]

STATE OF GEORGIA VS. WALTER LEE EVANS, WILLIAM VICTOR EVANS, KENNETH H. ADAMS, VIRGINIA SURRETT, R. K. SELLERS and FRANK A. BOYD	INDICTMENT NUMBER A-62407 (formerly #A-59256)

SECOND AMENDMENT TO MOTION TO SUPPRESS

COME NOW WALTER LEE EVANS, WILLIAM VICTOR EVANS, KENNETH H. ADAMS AND R.K. SELLERS (hereinafter Defendants), pursuant to the provisions of Title 27, Section 313, Ga. Code Ann.; Title 26, Chapter 30, Ga. Code Ann.; Title 18, Chapter 119, United States Code Ann., specifically Title 18, United States Code, Section 2518, Paragraph 10(a), subparagraph (i) (ii) (iii); and file this their Second Amendment to their previously filed Motion to Suppress, and respectfully show this Court the following:

That the aforementioned previously filed Motion to

Suppress was filed on or about March 23, 1982, and was amended on or about June 16, 1982.

That paragraphs 1 through 21 as amended are hereby incorporated by reference and made a part hereof as though said paragraphs as amended were expressly stated herein.

That further the previously filed Motion to Suppress as amended in 21 paragraphs should be amended to include the following paragraphs:

22.

That specifically surveillance warrants number 3 through 12 are void in contemplation of law and that one and all are derivative of violations of Section 2518(3), Title 18, United States Code, and that the Fulton County Superior Court had no territorial jurisdiction or any jurisdiction of any kind to authorize electronic surveillance and communications within circuits outside the Atlanta Judicial Circuit.

23.

That specifically, warrant #3 which authorized surveillance into the Stone Mountain Judicial Circuit is void in contemplation of law. Warrant #3 was a "second generation" warrant substantively relying on the fruits of warrants number 1 and 2 which were Fulton County warrants. Warrant #4 was a "second generation" warrant that went into Clayton County, said warrant being premised on the fruits of warrants 1 through 3. Thus, all warrants after warrant #3 are void to the extent they rely on the fruits of warrant #3 which is void for the reasons aforementioned. Independent of those reasons, warrant #4 which went into Clayton County is void because the lton Superior Court had no jurisdiction to authorize

interception of communications in the Clayton Judicial Circuit. Similarly, warrant #7 is void in that the Fulton County Superior Court had no jurisdiction to authorize surveillance of communications in the Cobb and Blue Ridge Judicial Circuits. Further, in a similar fashion, warrant #8 which operated in Cobb and Stone Mountain Judicial Circuits is void. Similarly, warrant #9 which operated in Stone Mountain, Tallapoosa and Cobb Judicial Circuits is void. Similarly, warrant #10 which went into the Gwinnett and Cobb County Judicial Circuit is void. Similarly, warrant #11 which went into the Flint Judicial Circuit is void. Similarly, warrant #12 which went into the Cobb Judicial Circuit is void.

24.

All the extra Atlanta Judicial Circuit warrants aforementioned are derivatively and substantively void in addition to the judicial jurisdiction question above in that the Fulton County District Attorney's Office had no authority to apply for said warrants in contemplation of Section 3004(c), Title 26, Ga. Code Ann. That is, the evidence will show that the "device or devices" were placed in the judicial circuits other than the Atlanta Judicial Circuit as aforementioned, thereby rendering the Fulton County District Attorney's Office ineligible and without authority to apply for this electronic surveillance in question in contemplation of Section 3004(c) mentioned above and Section 2516(2), Title 18, United States Code.

25.

Furthermore, warrants 1 through 12 are void and invalid in contemplation of law under the doctrine of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

26.

Specifically, the seminal surveillance warrant, warrant #1, is premised on an affidavit which in turn is premised on information received from two informants (hereinafter #1 and #2). Any and all references in affidavit #1 to informants #1 and #2 being in the residence of the Defendant Charles Samuel Cherry are false and the affiant knew them to be false.

27.

Further, informant #2 is in fact a Co-Defendant, Louis Patrick Nelson, whom the affiant met in the Summer of 1981 and is not a reliable informant who has given any information to law enforcement officers for "six years".

28.

That the informer who became known during evidentiary hearings pursuant to this case as the "Griner" informer does not exist. That is, pursuant to evidence given by State agents, informer #1 was identified as the Co-Defendant John Paul Couey. Further, informer #2 was initially identified as Louis Patrick Nelson, a Co-Defendant in this case. Neither Couey nor Nelson have ever been in Charles Samuel Cherry's home. Thus evolved the "Griner" informer who became informer #2 and Couey and Nelson became informers #1 and #1a.

29.

There exists no "Griner" informer, nor any informer whether labelled the "Griner" informer or informer #1 or informer #1a who was ever in the home of Charles Samuel Cherry as alleged in the affidavit #1 underlying surveillance warrant #1.

30.

That material allegations concerning the reliability of informer #2 who is in reality Nelson were false and the affiant knew them to be false. Furthermore, any and all allegations in affidavit #1 underlying warrant #1 to the effect that informant #1 and/or informant #2 were in the residence of Charles Samuel Cherry and saw therein a certain "telecopier" in operation, pursuant to a gambling conspiracy were false and affiant knew them to be false.

31.

That the reliability of informant #1 was premised on the reliability of informant #2 which renders, due to the above, the reliability of informant #1 to be fatally deficient in contemplation of law.

32.

That when the aforementioned material falsities are excised from affidavit #1, there remains in affidavit #1 no facts upon which probable cause could be found in contemplation of law.

33.

Furthermore, the conventional physical search warrant executed on January 12, 1982, is void and invalid in contemplation of law and that it was premised on the invalid and void electronic surveillance as manifested in warrants #1 through #12.

34.

The Defendants offer as proof the sworn testimony of State Agent McClendon and Townley previously given together with certain affidavits executed by said McClendon and Townley which are a part of this record. Addi-

tionally, the Defendants offer as proof, the testimony of Major Herman Griner, who is a major in the Atlanta Police Department and whose sworn statement has not, is not and will not be available prior to his testimony. Further, the Defendants offer as proof the testimony of the Co-Defendants John Paul Couey and Louis Patrick Nelson, who, it is verily believed, will testify under oath that they have never been in the residence of Charles Samuel Cherry, but whose sworn statements are unavailable to these Defendants because said Couey and Nelson are Co-Defendants in this case, whose cases remain undecided and who have previously taken the Fifth Amendment before this Court. These Defendants also offer as proof the sworn testimony of Charles Samuel Cherry who will testify that neither John Paul Couey nor Louis Patrick Nelson has ever been in his residence wherein it was alleged informants #1 and #2 had been. A sworn written statement by Charles Samuel Cherry is not at this time available insofar as undersigned counsel represents Cherry incident to this indictment and has advised Cherry not to execute any sworn written statements at this time relative to the question of fact involved herewith for reasons which address themselves to the attorney client privilege.

35.

Notwithstanding the case of *Nutter v. The State*, 162 Ga. App. 349 (1982), these Defendants assert that the State of Georgia has the burden pursuant to Section 313(b), Title 27, Ga. Code Ann. to prove the veracity of the affidavit as a condition precedent to showing that the search in question was lawful. This burden which the State has does not shift (see *Pope v. The State*, 134 Ga. App. 455, 1975).

36.

That specifically and categorically, these Defendants make no allegations of negligence or innocent mistake, i.e., these Defendants expressly assert that there was deliberate falsity regarding the circumstances surrounding what, if anything, informants #1 and #2 said as aforedescribed, and that specifically, the so-called "Griner" informer does not exist.

37.

That additionally, the conventional search executed on or about January 12, 1982, was void and invalid in contemplation of law in that the provisions of Section 308, Title 27, Ga. Code Ann. were violated and that there existed no valid probable cause in contemplation of law to issue or execute said warrant in a "no-knock" fashion. Furthermore, there was no judicial authority in contemplation of law to execute the conventional physical search warrant in a no-knock fashion on or about January 12, 1982.

38.

Furthermore, the conventional physical search executed pursuant to the warrant issued on or about January 12, 1982, was void in contemplation of the Fourth and Fourteenth Amendments and applicable provisions of the Georgia Constitution and the Georgia Code and that said execution was of a general exploratory nature unlimited in scope in contemplation of law.

39.

Furthermore, the search warrant underlying the conventional physical search on January 12, 1982, was patently defective in that certain judicial authorizations are

manifestly shown to have occurred after the actual execution of said search warrant.

40.

That more specifically with reference to paragraph 21 contained in the First Amendment to this Motion to Suppress, the fruits of all twelve surveillance warrants ought to be suppressed and that said fruits were disclosed/published in violation of Section 3004(c) to the Georgia Department of Revenue and the Internal Revenue Service. Further, it is verily believed that the fruits aforementioned were also disclosed/published in violation of Section 3004(c) to the Organized Crime Prevention Counsel. Said disclosures/publications were also in violation of Title 3 and are subject to suppression independently on that basis alone. All Defendants show that they have standing to bring this Motion to Suppress pursuant to Section 2518(10)(a), Title 18, United States Code, and that they are aggrieved persons whose communications were intercepted and/or who are targets of the various surveillance warrants.

41.

Furthermore, the Defendants show that this Motion to Suppress is explicitly brought under Section 2518(10)(a), to wit: (i) the communications were unlawfully intercepted; (ii) the order of authorization or approval under which they were intercepted is insufficient on its face; and (iii) the interceptions were not made in conformity with the order of authorization or approval. Furthermore, the Defendants bring this Motion to Suppress in contemplation of Section 2515, Title 18, United States Code, and pursuant to the provisions of Title 27, Section 313, Ga. Code Ann. and Title 26, Chapter 30, Ga. Code Ann.

WHEREFORE, these Defendants pray this their Second Amendment to their previously filed Motion to Suppress and their previously filed First Amendment be considered by this Court and that all prayers contained in preceding pleadings be incorporated herein and further, that an evidentiary hearing be granted at such time as will allow the Defendants to carry their burden and make their showing in contemplation of law; and further, that the Court consider the evidence to be offered by the Defendants at such hearing; and further, that this Court suppress any and all evidence derived from the numerous searches aforementioned in any criminal prosecution of these Defendants.

/s/ THEODORE S. WOROZBYT

THEODORE S. WOROZBYT
ATTORNEY FOR DEFENDANTS
WALTER LEE EVANS,
WILLIAM VICTOR EVANS,
KENNETH H. ADAMS, AND
R.K. SELLERS

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON ATLANTA JUDICIAL CIRCUIT STATE OF GEORGIA

[Filed in Office, Sept. 27, 1982; Deputy Clerk, Superior Court, Fulton County Georgia.]

STATE OF GEORGIA VS. WALTER LEE EVANS, et al.	INDICTMENT NUMBER A-62407 (formerly A-59256)

DEFENDANTS' FIRST MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

This case involves electronic surveillance which took place June 18, 1981, through December 27, 1981. There were twelve separate investigative warrants issued and various extensions attendant thereto (see Appendix A attached hereto, which is an index of the various warrants together with salient information pertaining thereto).

Pursuant to the twelve warrants, forty-one separate telephones were "tapped", twenty-three of said telephones being physically located outside of the territorial jurisdiction of the Atlanta Judicial Circuit.

The electronic surveillance first reached outside the Atlanta Judicial Circuit with tap number three which went into Dekalb County. Tap number four went into Clayton County, tap number seven went into Cobb and Cherokee Counties, tap number eight went into Cobb, Dekalb, and Rockdale Counties, tap number nine went into Dekalb, Paulding, and Cobb Counties, tap number ten went into Gwinnett and Cobb Counties, tap number

eleven went into Henry County, and tap number 12 went into Cobb County (see Appendix A).

THE FULTON SUPERIOR COURT DID NOT HAVE JURISDICTION TO AUTHORIZE ELECTRONIC SURVEILLANCE OUTSIDE THE ATLANTA JUDICIAL CIRCUIT

Title 18, U.S.C., Section 2518(3) provides (see Appendix C attached hereto, which is a copy of Chapter 19, Title 18, U.S.C., Sections 2510, et seq., the federal statutory scheme for electronic surveillance, hereinafter referred to as "Title III"):

> "Upon such application, the judge may enter an ex parte order, as requested or as modified, *authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting*, if the judge determines on the basis of the facts submitted by the applicant that . . .". (Emphasis added).

Axiomatically, compliance with Title III is a condition precedent to analyzing the validity of the surveillance in question in terms of the state statutory scheme. See *Cox v. The State*, 152 Ga. App. 453, 455 (1979). Expressed in the exclusionary sanction of Section 2515 of Title III, federal authority to prohibit the use in the state courts of evidence seized by electronic surveillance in violation of Title III originates in *Lee v. Florida*, 392 U.S. 378 (1968), which U.S. Supreme Court case was decided two days prior to the enactment of Title III.

"The territorial jurisdiction of a judge of the superior court is the judicial circuit in which he presides. Constitution, Article VI, Section III, Paragraph I (Code Ann. Section 2-3801)." *Granese v. The State*, 232 Ga. 193, 197 (1974).

There is of ccurse no patent or latent ambiguity incident to the verbiage of Section 2518(3) regarding the "territorial jurisdiction" of the Fulton County Superior Court in the context of this case. Since it would appear clear that the Fulton County Superior Court had no jurisdiction under the federal statutory scheme, it is not necessary to determine whether or not the court had jurisdiction under the state statutory scheme, i.e., Title 26, Chapter 30, Sections 3001, et seq.

Nevertheless, if one analyzes Section 3004(c) (Appendix D attached hereto), it is seen that the Fulton County Superior Court had no jurisdiction under said section to authorize electronic surveillance outside the Atlanta Judicial Circuit. That is, the evidence in this case will show that the "device or devices" to be used were placed in seven judicial circuits outside of the Atlanta Judicial Circuit, to wit: tap number three in Dekalb County (Stone Mountain Judicial Circuit); tap number four in Clayton County (Clayton Judicial Circuit); tap number seven in Cobb County (Cobb Judicial Circuit); tap number seven in Cherokee County (Blue Ridge Judicial Circuit); tap number eight in Cobb County (Cobb Judicial Circuit); Dekalb County (Stone Mountain Judicial Circuit); and Rockdale County (Stone Mountain Judicial Circuit); tap number nine in Dekalb County (Stone Mountain Judicial Circuit); Paulding County (Tallapoosa Judicial Circuit); Cobb County (Cobb Judicial Circuit); tap number ten in Gwinnett County (Gwinnett Judicial Circuit); tap number ten in Cobb County (Cobb Judicial Circuit); tap number eleven in Henry County (Flint Judicial Circuit); tap number twelve in Cobb County (Cobb Judicial Circuit).

THE FULTON COUNTY DISTRICT ATTORNEY'S OFFICE HAD NO PROSECUTORIAL AUTHORITY TO APPLY FOR ELECTRONIC SURVEILLANCE WARRANTS OUTSIDE THE ATLANTA JUDICIAL CIRCUIT

Section 2516(2) provides:

> "The principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications may apply to such judge for, and such judge may grant in conformity with Section 2518 of this Chapter and with the applicable state statute an order authorizing, or approving the interception of wire or oral communications . . ."

A review of the official legislative history of Title III is illuminating here. Said official legislative history is embodied in Senate Report number 1097, 90th Congress, Second Session, 1968, U.S.C. Congressional and Administrative News 2180, a copy of which is attached hereto as Appendix B and hereinafter referred to as Senate Report 1097 or S.R. 1097. S.R. 1097 was authored by Professor G. Robert Blakey, who was the primary draftsman of Title III (see Blakey and Hancock, *A Proposed Electronic Surveillance Control Act*, 43 N.D. Lawyer 657 (1968).

That provision of Title III, 2516(2), "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should

go a long way toward guaranteeing that no abuses will happen." S.R. 1097, Appendix B, page 538.

S.R. 1097 further provides, Appendix B, page 540 that:

> ". . . In most states, the principal prosecuting attorney at the next political level of a state, usually the county would be the district attorney, states attorney, or county solicitor. The intent of the proposed provision is to centralize areawide law enforcement policy in him. Who he is would also be a question of state law. Where there are both an attorney general and a district attorney, either could authorize applications, *the attorney general anywhere in the state and the district attorney anywhere in his county.*" Accord, *U.S. v. Giordano*, 416 U.S. 505, 522; 40 L.Ed.2d 341, 357 (1974) (Appendix E attached hereto).

The evidence will show that the device or devices (as defined by Title 26, Section 3009) as applied to the authorization embodied in Title 26, Section 3004(c), were in contemplation of law and fact *in* the seven judicial circuits outside that of the Atlanta Judicial Circuit. Thus, even under 3004(c), the Fulton County District Attorney had no authority *even to apply* to the Fulton County Superior Court for electronic surveillance warrants outside the Atlanta Judicial Circuit. Statewide authority belongs exclusively to the Attorney General for the State of Georgia. The conduct here in applying for electronic surveillance warrants in seven judicial circuits outside the Atlanta Judicial Circuit constitutes a clear manifestation of a usurpation of the jurisdiction of the Attorney General of Georgia. ". . . the authority to apply for court orders is to be narrowly confined", *Giordano, supra*, at U.S. 520, L.Ed 2d 356.

"But it is apparent that Congress desired to *centralize* and *limit* this authority where it was feasible to do so . . ." *Giordano, supra*, at U.S. 523, L.Ed.2d at 357.

The evidence will show that there were neither exigent circumstances, nor justification in contemplation of law for the Fulton County D.A.'s office to usurp the Attorney General's jurisdiction and overreach into seven judicial circuits as was done here.

The necessity for a strict construction of Title III which is argued, *infra*, necessitates finding the extra Atlanta Judicial Circuit electronic surveillance warrants invalid regardless of whether or not the Fulton County D.A.'s office was "justified". Nevertheless, the evidence will show that there was neither justification nor authority for the procedure followed here. In this regard, see *McCarty v. State*, 152 Ga. App. 726, 727 (1979), to wit:

> "If we allow county law enforcement officers to indiscriminately cross county lines, without a proper showing of justification of authority therefor, then we serve only to emasculate those provisions in our code delineating the jurisdiction of county law enforcement officers. See Code Ann. Section 23-1403. Although it is not our intent to discourage effective and zealous law enforcement, it is necessary that such law enforcement comply with notions of justice and that it be accomplished within the parameters of our constitution and laws."

IMPERMISSIBLE DISCLOSURES/PUBLICATIONS OF EVIDENCE DERIVED FROM ELECTRONIC SURVEILLANCE

Title 26, Section 3004(k) provides:

NECESSITY FOR STRICT CONSTRUCTION OF TITLE III

If Title III as applied is to fulfill the congressional objective of preserving conversation privacy from unjusti-

fied electronic surveillance, its provisions must be strictly construed in favor of privacy interests, [*United States v. Civella*, 533 F.2d 1395, 1400 (8th Cir. 1976); *United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975); *United States v. Robinson*, 359 F.Supp. 52, 58 (S.D. Fla. 1973) (citing *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct 2357, 33 L.Ed.2d 179; 1972); *Haina v. State*, 30 Md. App. 295, 352 A.2d 874, 880 (1976); *People v. Sher*, 38 N.Y.2d 600, 603, 381 N.Y.S.2d 843, 845, 345 N.E.2d 314, 317 (1976); *State v. Luther*, R.I., 351 A.2d 594 (1976)], because Congress intended Title III's procedural controls to be a "precondition to the acceptability of any wiretapping at all". [*In re Evans*, 146 U.S.App.D.C. 310, 314, 452 F.2d 1239, 1243 (1971), *cert. denied*, 408 U.S. 930 (1972)]. Less than strict enforcement of those procedural controls would "throw Congress's entire conception into jeopardy", [*Evans, supra*], and Title III can withstand constitutional challenge only by a limited reading of its authority to invade privacy. [*Application of United States*, 427 F.2d 639, 643 (9th Cir. 1970)]. Thus, "the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III." [*United States v. Kalustian*, 525 F.2d 585, 589 (9th Cir. 1976)].

Concern has been expressed that procedural laxity not displace Title III's protections, [*United States v. Giordano*, 469 F.2d 522, 530 (4th Cir. 1972), *aff'd*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974)], and any evidence of a "cavalier, carefree and careless attitude" has rightly been severely condemned. [*United States v. Huss*, 482 F.2d 38, 52 (2nd Cir. 1973)]. Deviations from the requirements of Title III would set precedents which encourage further erosion of the barriers against governmental intrusion of privacy. [*United States v. Narducci*, 341 F.Supp. 1107, 1115 (E.D. Pa. 1972), *aff'd mem.*, 500 F.2d 1401 (3d Cir.

1974)]. Title III's role as a model for state enactments increases the need to demand strict compliance with, and construction of, its provisions. [*See People v. Tartt*, 71 Misc.2d 955, 962, 336 N.Y.S.2d 919, 926 (Sup. Ct. 1972)]. These factors, combined with the complexity of Title III's structure and provisions, impose the "heavier responsibility" of closer judicial scrutiny of the government's actions than demanded by conventional search cases. [*United States v. Kleve*, 337 F.Supp. 557, 563 (D. Minn. 1971) (citing *United States v. Osborn*, 385 U.S. 323, 329, 87 S.Ct. 429, 433, 17 L.Ed.2d 394, 399, n.7; 1966), *rev'd on other grounds*, 465 F.2d 187 (8th Cir. 1972)].

Courts have rejected requests to rewrite Title III by making flexible interpretations which would have excused law enforcement errors, rather than demanding strict compliance with Title III's specific provisions. [*Cf. United States v. Giordano, supra*]. Legislative oversights [*United States v. Hall*, 488 F.2d 193, 198 (9th Cir. 1973); *In re Vericker*, 446 F.2d 244, 248 (2nd Cir. 1971)], and overly strict procedural requirements [*United States v. Robinson*, 468 F.2d 189, 194 (5th Cir. 1972)], should be amended by remedial legislation, not loose judicial interpretation.

An emphasis on strict construction of Title III's procedural controls fulfills the congressional intentions to preserve and favor individual privacy [*United States v. Chavez*, 416 U.S. 562, 597, 94 S.Ct. 1849, 1867, 40 L.Ed.2d 380, 404 (1974) (Douglas, J., dissenting in part)], through the structure of court-ordered and supervised eavesdropping. [*In re* Grand Jury Proceedings, 450 F.2d 199, 213 (3rd Cir. 1971), *aff'd sub nom. Gelbard v. United States*, *supra*]. Furthermore, a policy of strictly construing statutory terms, and resolving ambiguities in favor of individ-

ual privacy rather than governmental power, will avoid constitutional difficulties. [*In re Evans*, 146 U.S.App.D.C. 310, 317, 452 F.2d 1239, 1246 (1971), *cert. denied*, 408 U.S. 930 (1972)]. It is erroneous to "speak of Governmental interests as opposed to individual rights" because "it is the government's principal duty to safeguard individual liberties if it is to continue to serve the people well." [*United States v. Huss*, *supra*]. Thus, "it is especially important that the law not be bent in the name of expediency." [*United States v. King*, 478 F.2d 494, 506 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973). *See also Gelbard v. United States*, 408 U.S. 41, 50, 92 S.Ct. 2357, 2362, 33 L.Ed.2d 179, 188 (1972); *In re* Grand Jury Investigation (Carbo), 287 So.2d 43, 46 (Fla. 1973); *People v. Tartt*, *supra; People v. Ferrandino*, 69 Misc.2d 508, 510, 330 N.Y.S.2d 114, 116 (Albany County Ct. 1972)]. The right of conversational privacy can be protected only if courts demand strict satisfaction of the Constitution by the statute, and of the statute by law enforcement officers.

Submitted,

/s/ THEODORE S. WOROZBYT

THEODORE S. WOROZBYT
ATTORNEY FOR THE DEFENDANT

APPENDIX F

EXCERPTS FROM THE APPELLATE RECORD BEFORE THE GEORGIA SUPREME COURT SHOWING THAT THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED ON APPEAL

STATEMENT OF LEGAL ISSUES

I. Whether electronic surveillance extra-Atlanta Judicial Circuit (cross-country) may be applied for by the D.A. of the Atlanta Judicial Circuit and authorized by a Superior Court of the Atlanta Judicial Circuit.

II. Whether Georgia's RICO Act is repugnant to the Georgia Constitution's proscription against retroactive laws.

III. Whether Evans was entitled, upon written request, to jury charges on certain lesser offenses where said offenses were alleged in the subject indictment.

ENUMERATION OF ERRORS

1. The Trial Court Erred In Denying Evans' Motion To Suppress.
2. The Trial Court Erred In Denying Evans' General Demurrer.
3. The Trial Court Erred In Refusing To Charge on Certain Lesser Offenses.

I

THE TRIAL COURT ERRED IN DENYING EVANS' MOTION TO SUPPRESS

This case involves electronic surveillance which took place June 18, 1981, through December 27, 1981. There were twelve separate investigative warrants issued and

various extensions attendant thereto (see Appendix A attached hereto, which is an index of the various warrants together with salient information pertaining thereto).

Pursuant to the twelve warrants, forty-one separate telephones were "tapped", twenty-three of said telephones being physically located outside of the territorial jurisdiction of the Atlanta Judicial Circuit.

The electronic surveillance first reached outside the Atlanta Judicial Circuit with tap number three which went into Dekalb County. Tap number four went into Clayton County, tap number seven went into Cobb and Cherokee Counties, tap number eight went into Cobb, Dekalb, and Rockdale Counties, tap number nine went into Dekalb, Paulding, and Cobb Counties, tap number ten went into Gwinnett and Cobb Counties, tap number eleven went into Henry County, and tap number twelve went into Cobb County (see Appendix A).

THE FULTON SUPERIOR COURT DID NOT HAVE JURISDICTION TO AUTHORIZE ELECTRONIC SURVEILLANCE OUTSIDE THE ATLANTA JUDICIAL CIRCUIT

Title 18, U.S.C., §2518(3) provides (Title 18, U.S.C. §§2510, *et seq.*, the federal statutory scheme for electronic surveillance, hereinafter referred to as "Title III")[1]:

> "Upon such application, the judge may enter an ex parte order, as requested or as modified, *authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting*, if the judge determines on the basis of the facts submitted by the applicant that . . .". (Emphasis added).

[1] Attached as Appendix C.

Axiomatically, compliance with Title III is a condition precedent to analyzing the validity of the surveillance in question in terms of the state statutory scheme. See *Cox v. The State*, 152 Ga. App. 453, 455 (1979). Expressed in the exclusionary sanction of §2515 of Title III, federal authority to prohibit the use in the state courts of evidence seized by electronic surveillance in violation of Title III originates in *Lee v. Florida*, 392 U.S. 378 (1968), which U.S. Supreme Court case was decided two days prior to the enactment of Title III.

> "The territorial jurisdiction of a judge of the superior court is the judicial circuit in which he presides. Constitution, Article VI, §III, ¶I (Code Ann. §2-3801)." *Granese v. The State*, 232 Ga. 193, 197 (1974).

There is of course no patent or latent ambiguity incident to the verbiage of §2815(3) regarding the "territorial jurisdiction" of the Fulton County Superior Court in the context of this case. Since it would appear clear that the Fulton County Superior Court had no jurisdiction under the federal statutory scheme, it is not necessary to determine whether or not the court had jurisdiction under the state statutory scheme, i.e. Title 16-11-60[2], *et seq.*, Official Code of Georgia.

Nevertheless, if one analyzes 16-11-64(b)(i), it is seen that the Fulton County Superior Court had no jurisdiction under said section to authorize electronic surveillance outside the Atlanta Judicial Circuit. That is, the evidence in this case showed that the "device or devices"[3] to be used were placed in seven judicial circuits outside of the Atlanta Judicial Circuit, to wit: tap number three in

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[2] Attached as Appendix D.

[3] See analysis of "device" question *infra*, p. 18.

Dekalb County (Stone Mountain Judicial Circuit); tap number four in Clayton County (Clayton Judicial Circuit); tap number seven in Cobb County (Cobb Judicial Circuit); tap number seven in Cherokee County (Blue Ridge Judicial Circuit); tap number eight in Cobb County (Cobb Judicial Circuit); tap number eight in Dekalb County (Stone Mountain Judicial Circuit); tap number eight in Rockdale County (Stone Mountain Judicial Circuit); tap number nine in Dekalb County (Stone Mountain Judicial Circuit); tap number nine in Paulding County (Tallapoosa Judicial Circuit); tap number nine in Cobb County (Cobb Judicial Circuit); tap number ten in Gwinnett County (Gwinnett Judicial Circuit); tap number ten in Cobb County (Cobb Judicial Circuit); tap number eleven in Henry County (Flint Judicial Circuit); tap number twelve in Cobb County (Cobb Judicial Circuit).

THE FULTON COUNTY DISTRICT ATTORNEY'S OFFICE HAD NO PROSECUTORIAL AUTHORITY TO APPLY FOR ELECTRONIC SURVEILLANCE WARRANTS OUTSIDE THE ATLANTA JUDICIAL CIRCUIT

Title 18, U.S.C., Section 2516(2) provides:

> "The principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications may apply to such judge for, and such judge may grant in conformity with §2518 of this Chapter and with the applicable state statute an order authorizing, or approving the interception of wire or oral communications . . .".

A review of the official legislative history of Title III is illuminating here. Said official legislative history is embodied in Senate Report Number 1097, 90th Congress, Second Session, 1968, U.S.C. Congressional and Administrative News 2180, (a copy of which is attached hereto as *Appendix B* and hereinafter referred to as Senate Report 1097 or S.R. 1097). S.R. 1097 was authored by Professor G. Robert Blakey, who was the primary draftsman of Title III [see Blakey and Hancock, *A Proposed Electronic Surveillance Control Act*, 43 N.D. Lawyer 657 (1968)].

The provision of Title III, 2516(2):

> "Centralizes in a publicly responsible official, *subject to the political process*, the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will *avoid the possibility that divergent practices might develop*. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S.R. 1097, Appendix B, page 538. (Emphasis added)

In this case, the Fulton County D.A., who is accountable pursuant to the "political process" only to the voters of Fulton County applied for and received authorization of a Fulton County Superior Court Judge (also "accountable" only to the Fulton County voters) to tap into seven judicial circuits which contain 18 counties and 1,460,206 Georgians (according to 1980 census) to whom neither the D.A. nor the judge is accountable. Those 1,460,206 Georgians were disenfranchised by the legal process followed here.

Thus the "lines of responsibility lead to an identifiable person" who would be immune (under the State's theory) to the accountability (of the political process) of 1,460,206 voters.

It *must* be emphasized that the U. S. Supreme Court has embraced the parameters manifested in S.R. 1097 without qualification. Thus S.R. 1097 (Appendix B, p. 539); *United States v. Giordano*, 416 U.S. 505, 522; 40 LED 2d 341, 357; 94 S.Ct. 1920 (footnote 11) shows:

> "Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize the application to a State judge of competent jurisdiction, as defined in section 2510(9), for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to *statewide* law enforcement in the area of the use of electronic surveillance in the *chief prosecuting officer of the State.* Who that officer would be would be a question of State law. *Where no such office exists*, policymaking would not be possible on a statewide basis; it would have to move down to the next level of government.
>
> In most states, that principal prosecuting attorney at the next political level of a state, usually the county, would be the district attorney, state's attorney or county solicitor. The intent of the proposed provision is to centralize areawide law enforcement policy in him. Who he is would also be a question of state law. Where there are both an attorney general and a district attorney, either could authorize applications, *the attorney general anywhere in the state and the district attorney anywhere in his county.*" (Emphasis added).

The evidence showed that the device or devices [as defined by Title 16-11-60(1)] were in contemplation of law and fact *in* the seven judicial circuits outside that of

the Atlanta Judicial Circuit. Thus, under 16-11-64(b)(1), the Fulton County District Attorney had no authority *even to apply* to the Fulton County Superior Court for electronic surveillance warrants outside the Atlanta Judicial Circuit.

Statewide authority belongs exclusively to the Attorney General for the State of Georgia. The conduct here in applying for electronic surveillance warrants in seven judicial circuits outside the Atlanta Judicial Circuit constitutes a clear usurpation of the jurisdiction of the Attorney General of Georgia. ". . . [T]he authority to apply for court orders is to be narrowly confined", *Giordano, supra*, at U.S. 520, L.Ed.2d 356.

> "But it is apparent that Congress desired to *centralize* and *limit* this authority where it was feasible to do so . . .". *Giordano, supra*, at U.S. 523, L.Ed.2d at 357.

The evidence showed that there were neither exigent circumstances, nor justification in contemplation of law for the Fulton County District Attorney's office to usurp the Attorney General's jurisdiction and overreach into seven judicial circuits as was done here.

In this regard, see *McCarty v. State*, 152 Ga. App. 726, 727 (1979), to wit:

> "If we allow county law enforcement officers to indiscriminately cross county lines, without a proper showing of justification or authority therefor, then we serve only to emasculate those provisions in our code delineating the jurisdiction of county law enforcement officers. See Code Ann. §23-1403. Although it is not our intent to discourage effective and zealous law enforcement, it is necessary that such law enforcement comply with notions of justice and that it be accomplished within the parameters of our constitution and laws."

It was undisputed that the Fulton County D.A. did not contact the Attorney General of Georgia or the respective D.A. of any of the various seven judicial circuits into which electronic taps went prior to said taps going in. Indeed, although the taps embraced June 18 through December 27, 1981, the same respective D.A.'s were not contacted at all until the physical searches in January, 1982. (Testimony of Fulton County D.A., Vol. I, pp. 93-97).

Evans sought to show that the D.A.'s (from the seven judicial circuits into which taps went) knew of no reason why they would not have cooperated with the Fulton County D.A.'s office in this investigation at the time taps went into their respective jurisdictions. All seven D.A.'s were under subpoena, Evans' counsel had spoken with said D.A.'s and indicated what he anticipated their testimony would be.

Further, Evans sought to show that Attorney General Bowers (who also was under subpoena), would have testified in the same manner, i.e., that there existed no reason why the Attorney General wouldn't have cooperated with the Fulton County D.A.'s office in its state-wide investigation. The proffer was rejected erroneously, see Vol. I, pp. 114-116.

What possible reason could the Fulton D.A. have had to conduct a six month, state-wide (jurisdictionally speaking, see Appendix E), wire-tap where over seven hundred (700) hours of tapes were made without even *advising* the Attorney General of Georgia?

This question is not proffered rhetorically. Questions concerning public policy require answers. Is this not evidence of a "cavalier, carefree, and careless attitude",

which should be severely condemned, *United States v. Huss*, 482 F2d 38, 52 (2nd, 1973(:

> "It should be clear by now that the problem of electronic surveillance strikes deep emotional chords in a people whose concern for the protection of privacy—particularly the privacy of words and thoughts—is historic. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress responded to this by balancing the needs of law enforcement againstt he important public and individual concern for privacy. It authorized electronic surveillance only under the most rigorous, carefully drawn standards. A cavalier, carefree and careless attitude towards the conduct of electronic surveillance makes a mockery of the labors of Congress to tailor the statute with precision. More importantly, it offends the spirit of liberty which has distinguished this nation from its birth."

NECESSITY FOR STRICT CONSTRUCTION OF TITLE III

If Title III as applied is to fulfill the congressional objective of preserving conversational privacy from unjustified electronic surveillance, its provisions must be strictly construed in favor of privacy interests, [*United States v. Civella*, 533 F.2d 1395, 1400 (8th Cir. 1976); *United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975); *United States v. Robinson*, 359 F.Supp. 52, 58 (S.D. Fla. 1973) (citing *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179; 1972)], because Congress intended Title III's procedural controls to be a "precondition to the acceptability of any wiretapping at all". [*In re Evans*, 146 U.S.App.D.C. 310, 314, 452 F.2d 1239, 1243 (1971), *cert. denied*, 408 U.S. 930 (1972)]. Less than strict enforcement of those procedural controls would "throw Congress's entire conception into jeop-

ardy", (*Evans, supra*), and Title III can withstand constitutional challenge only by a limited reading of its authority to invade privacy. [*Application of United States*, 427 F.2d 639, 643 (9th Cir. 1970)]. Thus, "the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III." [*United States v. Kalustian*, 525 F.2d 585, 589 (9th Cir. 1976)].

Concern has been expressed that procedural laxity not displace Title III's protections, [*United States v. Giordano*, 469 F.2d 522, 530 (4th Cir. 1972), *aff'd*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974)], and any evidence of a "cavalier, carefree and careless attitude" has rightly been severely condemned. [*United States v. Huss*, 482 F.2d 38, 52 (2nd Cir. 1973)]. Deviations from the requirements of Title III would set precedents which encourage further erosion of the barriers against governmental intrusion of privacy. [*United States v. Narducci*, 341 F.Supp. 1107, 1115 (E.D. Pa. 1972), *aff'd mem.*, 500 F.2d 1401 (3rd Cir. 1974)]. Title III's role as a model for state enactments increases the need to demand strict compliance with, and construction of, its provisions. [See *People v. Tartt*, 71 Misc.2d 955, 962, 336 N.Y.S.2d 919, 926 (S.Ct. 1972)]. These factors, combined with the complexity of Title III's structure and provisions, impose the "heavier responsibility" of closer judicial scrutiny of the government's actions than demanded by conventional search cases. [*United States v. Keleve*, 337 F.Supp. 557, 563 (D. Minn. 1971) (citing *United States v. Osborn*, 385 U.S. 323, 329, 87 S.Ct. 429, 433, 17 L.Ed.2d 394, 399, n. 7; 1966), *rev'd on other grounds*, 465 F.2d 187 (8th Cir. 1972)].

Courts have rejected requests to rewrite Title III by making flexible interpretations which would have excused law enforcement errors, rather than demanding strict

compliance with Title III's specific provisions. (*Cf. United States v. Giordano, supra*), *U.S. v. Marion*, 535 F.2d 697, 706 (2nd Cir., 1976). Legislative oversights [*United States v. Hall*, 488 F.2d 193, 198 (9th Cir. 1973); *In re Vericker*, 446 F.2d 244, 248 (2nd Cir. 1971)], and overly strict procedural requirements [*United States v. Robinson*, 468 F.2d 189, 194 (5th Cir. 1972)], should be amended by remedial legislation, not loose judicial interpretation.

An emphasis on strict construction of Title III's procedural controls fulfills the congressional intentions to preserve and favor individual privacy [*United States v. Chavez*, 416 U.S. 562, 597, 94 S.Ct. 1849, 1867, 40 L.Ed.2d 380, 404 (1974) (Douglas, J., dissenting in part)], through the structure of court-ordered and supervised eavesdropping. [*In re* Grand Jury Proceedings, 450 F.2d 199, 213 (3rd Cir. 1971), *aff'd sub nom.; Gelbard v. United States, supra*]. Furthermore, a policy of strictly construing statutory terms, and resolving ambiguities in favor of individual privacy rather than governmental power, will avoid constitutional difficulties. [*In re Evans*, 146 U.S. App.D.C. 310, 317, 452 F.2d 1239, 1246 (1971), *cert. denied*, 408 U.S. 930 (1972)]. It is erroneous to "speak of governmental interests as opposed to individual rights" because "it is the government's principal duty to safeguard individual liberties if it is to continue to serve the people well." [*United States v. Huss*, 482 F.2d 38, 52 (2d Cir., 1973.) Thus, "it is especially important that the law not be bent in the name of expediency." [*United States v. King*, 478 F.2d 494, 506 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973). *See also Gelbard v. United States*, 408 U.S. 41, 50, 92 S.Ct. 2357, 2362, 33 L.Ed.2d 179, 188 (1972)]. The right of conversational privacy can be protected only if courts demand strict satisfaction of the Constitution by the statute, and of the statute by law enforcement officers.

Thus, a disturbing dichotomy necessarily evolves from the State's theory.

On the one hand, there exists a rudimentary principle of law in this State that a Superior Court may only issue a conventional search warrant where the search is to be executed within the judicial circuit of said Superior Court. Yet on the other hand, as the State would have it, a Superior Court could issue the substantially more intrusive (in contemplation of societies' privacy interests) electronic surveillance warrant pursuant to surveillance of any telephone in the State.

It must be remembered that, aside from invasion of privacy interests, a wiretap is a *search* and *seizure* of evidence. The distinction between physical and *mere* evidence has long been dissolved. Seizing one's communications while one sits talking on the telephone in Paulding (or any other) County for the purposes of using the substance of said communication to criminally prosecute (in Fulton County) is, purely and simply, seizing *evidence*.

The State would have the panoply of essential jurisdictional protections of Title III survive an Orwellian metamorphosis worthy of Kafka.

APPENDIX G

ARTICLE 3

INVASIONS OF PRIVACY

PART 1

WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

16-11-60. Definitions.

As used within this part, the term:

(1) "Device" means an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds or for observing, photographing, recording, or transmitting visual images and which involves in its operation electricity, electronics, infrared, laser or similar beams, but not including merely focusing, lighting, illuminating equipment, optical magnifying equipment, or device commonly referred to as an "individual hearing aid."

(2) "Private place" means a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3009, enacted by Ga. L. 1968, p 1249, § 1.)

16-11-62. Eavesdropping, surveillance, etc., which invades privacy of another.

It shall be unlawful for:

(1) Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place;

(2) Any person, through the use of any instrument or apparatus, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view; provided, however, that it shall not be unlawful to use any camera, photographic equipment, videotape equipment, or other devices to observe, photograph, or record the activities of persons incarcerated in any jail, correctional institution, or any other facility in which persons who are charged with or who have been convicted of the commission of a crime are incarcerated, provided that such equipment shall not be used while the prisoner is discussing his case with his attorney;

(3) Any person to go on or about the premises of another or any private place for the purpose of invading the privacy of another by eavesdropping upon their conversations or secretly observing their activities;

(4) Any person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication;

(5) Any person to divulge to any unauthorized person or authority the content or substance of any private message intercepted lawfully in the manner provided for in Code section 16-11-65; or

(6) Any person to commit any other acts of a nature similar to those set out in paragraphs (1) through (5) of this Code section which invade the privacy of another. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3001, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1100, § 1.)

16-11-64. Interception of wire or oral transmissions by law enforcement officers.

(a) *Application of part to law enforcement officers.* Except only as provided in subsection (b) of this Code section, nothing in this part shall apply to a duly constituted law enforcement officer in the performance of his official duties in ferreting out offenders or suspected offenders of the law or in secretly watching a person suspected of violating the laws of the United States or of this state, or any subdivision thereof, for the purpose of apprehending such suspected violator.

(b) *Procedure.* When in the course of his official duties, a law enforcement officer desiring to make use of any device, but only as such term is specifically defined by Code Section 16-11-60 and such use would otherwise constitute a violation of Code Section 16-11-62, the law enforcement officer shall act only in compliance with the procedure provided for in this subsection:

(1) When there is probable cause to believe that a person is committing or has committed an act which endangers the national security of the United States or the security of this state or that such person is committing or has committed the crime of treason, insurrection, rebellion, espionage, sabotage, or any felony involving bodily harm, or any crimes involving arson, kidnapping, narcotics, dangerous drugs, importation or sale of marijuana or any controlled substance, burglary, prostitution, theft, blackmail, extortion, bribery, gambling, racketeering activity, or any felony involving alcoholic beverage laws or auto thefts or there is probable cause to believe that a private place is being utilized or has been utilized for the commission of any such crime, then, upon written application, under oath,

of the district attorney of the circuit wherein the device is to be physically placed, or the Attorney General, which application affirms that there is probable cause to believe:

(A) That a person is committing or has committed any of the crimes enumerated in this paragraph; or

(B) That a private place is being utilized or has been utilized for the commission of any of the crimes enumerated in this paragraph

and sets forth specifically the basis of such probable cause and particularly describes the person or place, the crime or crimes, the device or devices to be used, and the specific conversations and activities to be overheard or observed, as the case may be, any judge of the superior court of the circuit aforesaid may issue an investigation warrant permitting the use of devices, as defined by Code Section 16-11-60, for the surveillance of such person or place, provided the warrant specifies with particularity the device or devices the use of which is to be permitted thereby; the purpose, duration, and circumstances of use permitted; the crime or crimes allegedly being committed; and the person or persons and place or places to be subject to such surveillance.

(2) The judge, before issuing such a warrant, shall satisfy himself that the party initiating the application for the warrant is aware of the facts and circumstances through his own personal knowledge which are sufficient to lead a man of reasonable caution to believe that the alleged crime set forth in the application has been committed or is being committed or that such person has been informed of such facts and circumstances by a reasonably trustworthy informational

source. The judge shall also satisfy himself that there is set forth in the application exigencies adequately supported by facts and circumstances which overcome and override the need for giving of notice of the surveillance to the parties to be overheard or observed by the use of such devices;

(3) Investigation warrants issued under this Code section shall be valid for no more than 20 days after issuance, unless renewed for an additional 20 day period for good cause shown at the time of written application for renewal;

(4) The officer executing the warrant must make a return of the warrant to the judge which shall set forth specifically how the warrant was used and employed and what was obtained thereby. The return shall reflect that the investigation or search in pursuance of the warrant was terminated immediately upon the conversation or activities which were authorized to be overheard, intercepted, or observed were in fact obtained. The return shall set forth with particularity the law enforcement officer or officers or their agents who actually employed the devices used in the execution of the warrant;

(5) The application for any investigation warrant under this Code section, any supporting evidence in connection therewith, and any entry of the issuance of an investigation warrant as a result thereof shall remain confidential and in the custody of the judge and shall not be released nor information touching same in any manner be disclosed, except upon written order of the judge or except at the time of trial of the case in which such evidence is used or in which evidence derived from such surveillance is used;

(6) The applicant for the warrant shall return same and report back to the judge issuing same within 30 days of the issuance of the warrant. In the event no evidence of one of the specific crimes set forth in this Code section has been obtained through the use of such device or devices, it shall be the duty of the applicant physically to destroy all evidence obtained by surveillance and to certify that fact in writing to the judge under oath;

(7) In the event evidence of or information concerning the specific crime set forth in the warrant is obtained through the use of such device or devices, the applicant shall so certify in writing under oath in his report under paragraph (6) of this subsection. Upon the return of an indictment or filing of an accusation based in whole or in part on such evidence or information or any part thereof, it shall be the duty of the prosecuting attorney promptly to notify the accused of the existence and substance of such evidence or information and, if the same has been reduced to a permanent form, shall make it available to the accused for inspection and copying; and

(8) Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be inadmissible in any criminal prosecution.

(c) *Admissibility of evidence.* Evidence obtained in conformity with this Code section shall be admissible only in the courts of this state having felony and misdemeanor jurisdiction. When an investigative or law enforcement

officer, while engaged in intercepting wire or oral communications or in observation in the manner authorized herein, intercepts wire or oral communications or obtains fruits of observation relating to offenses for which an investigation warrant may issue, other than those specified in the order of authorization, the contents or fruits thereto and evidence derived therefrom may be disclosed or used in the same manner as if a surveillance warrant covering such crimes had initially been used.

(d) *Providing facilities or technical assistance.*

(1) It shall not be unlawful under the provision of this part for an officer, employee, or agent of any communication common carrier to provide facilities or technical assistance to an investigative or law enforcement officer, who, pursuant to this Code section, is authorized by warrant to intercept a wire or oral communication.

(2) An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian, or other person shall furnish the applicant forthwith with such technical information, facilities, and technical assistance as is necessary to accomplish the interception unobtrusively and with minimum of interference with the services that the carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(e) *Defenses.* A good faith reliance on a court order or

legislative authorization shall constitute a complete defense to any civil or criminal action brought under this part or under any other law. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3004, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 615, § 1; Ga. L. 1972, p. 952, § 1; Ga. L. 1979, p. 824, § 1; Ga. L. 1980, p. 326, § 1; Ga. L. 1982, p. 1385, § 7; Ga. L. 1982, p. 2319, § 1; Ga. L. 1983, p. 3, § 13.)

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NO. 83-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALTER LEE EVANS, ET AL.,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record
for Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

LEWIS R. SLATON
District Attorney

H. ALLEN MOYE
Assistant District Attorney

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

BEST AVAILABLE COPY

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QUESTION PRESENTED

Did the trial court properly deny the motion to suppress and did the Supreme Court of Georgia properly conclude that the wiretaps utilized in the instant case did not exceed the jurisdiction or authority of the Fulton County District Attorney?

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STATE OF GEORGIA,

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TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioners were indicted along with other individuals by the grand

jury of Fulton County. Petitioners were charged with Violation of the Georgia Racketeer Influenced and Corrupt Organizations Act and entered pleas of not guilty. The trial was held in the Superior Court of Fulton County beginning on October 7, 1982. Petitioners Walter Lee Evans, William Victor Evans and Kenneth H. Adams were found guilty as charged. Petitioner R. K. Sellers was found guilty of commercial gambling.

The instant cases are companion cases to Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983), reversed and remanded by this Court for a new suppression hearing on May 21, 1984. Although the issues presented are not the same, the defendants in both cases were involved in the same criminal

enterprise. In general, the facts indicate that numerous individuals, including the Petitioners in the instant case and those in Waller, supra, were involved in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. This information was transmitted by telephone and telecopier and stored in a microcomputer.

The evidence in the instant case showed that Petitioner Walter Lee Evans provided the telecopiers to two lottery stations which were transmitting lottery information to Petitioner Kenneth H. Adams. Petitioners Adams, Victor Evans and R. K. Sellers were scheduled by Walter Lee Evans to contact various persons

to receive bets. (T. 757-759, 771-795). The evidence further showed that Walter Lee Evans ran his own lottery bank and provided a reinsurance service to other lottery bankers who wished to limit their losses.

Walter Lee Evans, through the other codefendants, contacted various lottery bankers and received "layoff" bets. W. B. Burke testified that the lottery which he and Guy Waller banked would write between $5000 to $6000 worth of lottery bets each day. Of that total, Burke and Waller would be responsible for winners on most bets. As to those numbers on which the bank could suffer a significant loss, Burke and Waller were insured by the Evans organization by the process of layoff bets to that organization.

Much of the evidence utilized at trial was obtained pursuant to twelve surveillance warrants issued by a Fulton County Superior Court judge upon application by the district attorney of Fulton County. A motion to suppress was held prior to trial, after which time the trial court concluded that the evidence could be admitted.

After the conclusion of the trial, the instant Petitioners filed a notice of appeal in the Supreme Court of Georgia. That court affirmed the convictions and sentences. Evans v. State, 252 Ga. 312, ___ S.E.2d ___ (1984). A motion for rehearing was denied on March 28, 1984.

Petitioners have now filed the instant petition for a writ of

certiorari challenging the decision by the Supreme Court of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS AND THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT THE DISTRICT ATTORNEY AND SUPERIOR COURT JUDGE WERE AUTHORIZED TO APPLY FOR AND ISSUE THE SURVEILLANCE WARRANTS IN QUESTION.

The issue presented in the instant case challenges only the authority and jurisdiction of the district attorney and the superior court judge of the Atlanta Judicial Circuit to apply for and issue certain of the electronic surveillance warrants issued in the instant case. In particular, Petitioners challenge the issuance of the warrants authorizing surveillance where the telephones in question were located outside of Fulton County,

i.e., the Atlanta Judicial Circuit. Respondent submits that the Supreme Court of Georgia properly concluded that the surveillance warrants were within the authority and jurisdiction of the court and the district attorney.

In addressing the issue presented in the instant case, the Supreme Court of Georgia set forth the following facts to describe the equipment used for the surveillance in question:

> The Fulton district attorney's surveillance team worked out of a rented motel room near the intersection of Sylvan Road and Interstate 85, in Hapeville, Fulton County (the "listening post"). The initial step in the installation of each of

the wiretaps was to present the court order authorizing the wiretap to the telephone company, which then selected an "appearance point" and informed the investigations of its location. An "appearance point" was a site, located at some point between the telephone to be tapped and the telephone company's central switching office servicing it, where the line to be tapped, also known as the "subscriber line," converged with another telephone line running to the central switching office, with the latter line being leased to the district

attorney (the "leased line"). All the appearance points assigned for the surveillances involved in this case were located in neighborhood junction boxes, also known as terminal boxes, which (for purposes of this appeal) were located in the same county as the telephone to be tapped.

* * *

To forestall detection, an inductor coil/jumper wire, placed in the neighborhood terminal box, and a control unit, located at the listening post, were used.

Evans v. State, supra, 252 Ga. at 313-314).

The state presented the testimony of Sergeant John Woodard who testified that he installed the surveillance equipment used in the instant case. An inductor coil, known as "101-A" was placed in the telephone junction box which was located at or near the subject telephone. This inductor coil is a piece of equipment consisting of two magnetic coils and four lead wires. One cable pair from the coil was attached to a binding post assigned to the subject lines and a second cable pair was connected to the telephone line leased to the police officers. This piece of equipment prevented voltage loss and inadvertent intrusion. The evidence specifically revealed that this piece of equipment alone would not permit interception of

a telephone call. (T. 40). This piece of equipment is an integral part of a set of equipment and without this piece of equipment or a substitute piece of equipment, interception would not be possible. (T. 59).

The listening post in Fulton County contained three different pieces of equipment: the control unit, a computerized pen register and a tape recorder. The 105 control unit was attached electronically through the telephone line and the telephone switchboard to the 101-A inductor coil and electronically activated the 101-A. (T. 40). A 110 dialed number decoder or pen register, which records only "the outgoing telephone number . . . the time and date that the telephone is taken off the hook, and

the time and date of incoming calls," was electronically connected to the 105 control unit. (T. 41). This 110 is essentially a computerized pen register which was located at the listening post. The final piece of equipment, the tape recorder, was connected to the 110. This piece of equipment specifically records the communication. In this sequence of equipment, oral communications cannot be heard until the tape recorder is turned on. Absent the tape recorder, the equipment constitutes only a pen register. (T. 43). All of the equipment except for the 101-A inductor coil was always located within the Atlanta Judicial Circuit in Fulton County.

The trial court overruled the motion to suppress and specifically concluded that the district attorney of the Atlanta Judicial Circuit was authorized to apply for and the Superior Court of the Atlanta Judicial Circuit was authorized to issue the investigation warrants in the case. In so finding, the trial court concluded that the "device" was located and the interceptions occurred in Fulton County.

It is recognized that the issue in question involves not only state statutes, but also the requirements of Title III of the Omnibus Crime Control and Safe Streets Act. The requirements of both state and federal law must be complied with where applicable.

18 U.S.C. § 2516(2), the Omnibus Crime Control and Safe Streets Act provides the following:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the

> applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling. . . .

This section also provides that a judge may enter an ex parte order authorizing the interception of wire or oral communications "within the territorial jurisdiction of the court

in which the judge is sitting." 18 U.S.C. § 2518(3). The word "intercept" is defined under the statute to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Thus, a reading of 18 U.S.C. § 2518(3), substituting the above definition of "intercept," reveals that this code section provides that a judge may enter an order authorizing the aural acquisition of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting. As noted by the Supreme Court of Georgia, "it is undisputed the only aural acquisition of the defendant's communications

occurred in the Atlanta Judicial Circuit (Fulton County) where the judge authorizing the investigative warrants was sitting." Evans v. State, supra, 252 Ga. at 316. Thus, it is clear that under federal law, the issuance of the warrants was authorized by the superior court judge of Fulton County.

Under State law, Georgia law does not refer to a place of interception, but a place where the "device" is physically placed. O.C.G.A. § 16-11-64(b) specifically provides the following:

> [U]pon written application, under oath, of the district attorney of the circuit wherein the device is to be physically placed . . . any

> judge of the superior court of the circuit aforesaid may issue an investigation warrant permitting the use of devices, as defined by Code Section 16-11-60 for the surveillance of such person or place. . . .

The code also specifically defines the word "device" as "an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds . . . and which involves in its operation electricity [or] electronics. . . ." O.C.G.A. § 16-11-60(1). The issue in question then becomes which of the particular pieces of equipment concerned constitutes a "device" under this statute.

The Petitioners have urged previously that the inductor coil constitutes a wiretap "device" under this code section which was physically placed outside the Atlanta Judicial Circuit. The state has consistently asserted that this piece of equipment alone cannot constitute the device contemplated in the code section. The inductor coil, i.e., the 101-A, is merely a coil which transmits electrical impulses. These impulses are indecipherable without the 105 control unit and the 110 DNR to which the 101-A is electronically connected. The 105 control unit activates the 101-A, i.e., the inductor coil. The 110 DNR converts the electrical impulses into a digital readout of information. This set of

interrelated equipment constitutes nothing more than a pen register. A pen register is governed by neither the federal nor state wiretap laws. See Smith v. Maryland, 422 U.S. 935 (1979); Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981).

The only way that the set of equipment comes within the purview of either the state or federal statutes is by the addition of a tape recorder. The addition of the tape recorder adds an element to the surveillance equipment which is the essential focus of the legislative intent behind the state and federal statutes, that is, the ability to intercept and interpret aural communications. It is clear from a reading of the statutes and the

history that both state and federal statutes show a clear intention to include as devices only equipment which allows for the interception of aural communication.

Respondent submits that the evidence clearly shows that the wire communcations were intercepted in Fulton County by the use of the tape recorder. Any invasion of privacy which the statutes in question were enacted to control, occurred in Fulton County at the point of the connection of the tape recorder. The other equipment utilized by the law enforcement officers was simply a pen register device not subject to control by either statutes. Thus, as the interception occurred in and the device was employed in Fulton County,

the district attorney for the Atlanta Judicial Circuit and the Superior Court of Fulton County were authorized to apply for and had jurisdiction to issue the warrants in question.

Petitioners have asserted in the lower courts that the "device" as defined in the state statute is the 101-A and that jurisdiction should be in the circuit in which that particular piece of equipment is located. The inductor coil is placed in a junction box where there are two sets of wires, one from the subject telephone and one from the leased line. The junction box is installed by the telephone company, not by the state. Furthermore, the junction box may not be the only location where a 101-A may be employed as the piece of

equipment can often be employed in two or three different locations depending upon the wiring arrangements utilized by the telephone company. Thus, to refer to the 101-A as the piece of equipment that establishes jurisdiction, is essentially to confer the designation of jurisdiction to the Southern Bell Telephone Company.

As concluded by the Supreme Court of Georgia, "the inductor coil involved here was not a device used to overhear, record or intercept defendant's conversations. . . The coil was a device to prevent detection of those devices being used to overhear and record defendants' conversations, which devices were physically located in Fulton County." Evans v. State, 252 Ga. at 318.

Petitioners have relied upon several cases in their brief, including United States v. Giordano, 416 U.S. 505 (1974). Respondent submits that the decision in that case does not support the position taken by the Petitioners. To make this conclusion, the courts would again place the state in the position of having the telephone company determine through the wiring arrangements who has the authority to apply for and issue warrants for electronic surveillance. Thus, the location of the 101-A cannot be relied upon for the determination of jurisdiction in order to enforce any policy considerations supposedly set forth in Giordano because there is no necessary

given geographical or jurisdictional area.

There are only two fixed points which bear any rational relationship to the policy considerations that are discussed and implemented through Title III of thr Omnibus Crime Control and Safe Streets Act of 1968 and of the Georgia statute. Those two points are the point where the officers are listening to the surveilled conversations and the point where the subject is engaging in the surveilled conversations. The Petitioners themselves have never contended that the surveilled telephone is the "device" or the point of interception. Furthermore, under 18 U.S.C. § 2510(5)(1), such equipment is excluded as being a "device."

Thus, under state and federal law there is only one location that can be identified as a jurisdictional point, that is, the point where the oral communication is intercepted aurally by the officers. This is the point where the tape recorder receives the electronic impulses and converts those impulses into sound. Placing jurisdiction at any other point is inconsistent both with the policy interests identified and with the statutory placement of jurisdiction.

Respondent submits that this Court should conclude as did the Supreme Court of Georgia that the warrants issued in the instant case were within the authority and jurisdiction of both the district attorney's office of the Atlanta Judicial Circuit and the

Superior Court of Fulton County. Therefore, as both the state and federal statutory requirements were met in the instant case, no constitutional question exists justifying review by this Court.

CONCLUSION

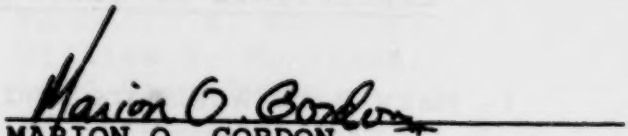
For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioners.

Respectfully submitted,

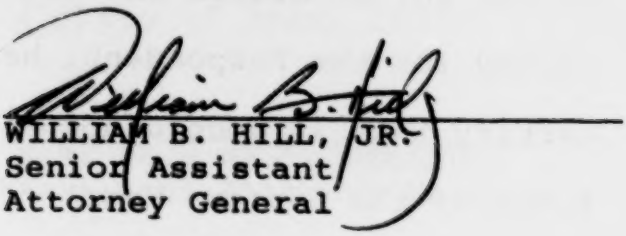
MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

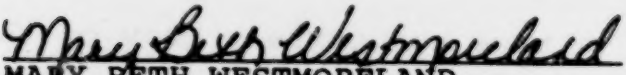
(Signatures continued)



MARION O. GORDON
First Assistant
Attorney General



WILLIAM B. HILL, JR.
Senior Assistant
Attorney General



MARY BETH WESTMORELAND
Assistant Attorney General

LEWIS R. SLATON
District Attorney

H. ALLEN MOYE
Assistant District Attorney

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioners by depositing a copy of same in the United States mail with proper address and adequate postage to:

Theodore S. Worozbyt
William A. Morrison
1414 Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303-1665

This 13th day of July, 1984.

MARY BETH WESTMORELAND
Assistant Attorney General